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## A VIEW FROM THE BRIDGE:<sup>†</sup> A BRIEF LOOK AT THE PROGRESSION OF CASES OF ELDER FINANCIAL EXPLOITATION PROSECUTIONS

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<sup>†</sup> By this, we mean we are taking an expansive view of the topic. The Authors would like to thank Paul Greenwood and Candace Heisler for their insights; Professors Bowman and Flowers for their feedback; and students Alyssa Aquaviva, Chelsea Ejankowski, Roger Klafka, Robert McLaren, and Arienne Valencia for compiling the cases for the spread sheet.

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*Elder financial exploitation is a continuing problem in the United States, and the prosecution of elder financial exploitation has failed to keep up with modern problems and laws. In this Article, the Authors explore nearly three decades of appellate decisions from across the United States. In these examples, the Authors show how different courts have treated both victims and defendants through their appellate decisions. The Authors examine the basic elements that make up financial exploitation throughout the country. Cases from many courts, and of differing notoriety are explored, noting the difference in law and discretion across the United States. Finally, the Authors suggest resources for prosecutors and discuss how the United States can catch up with those who are taking advantage of an elderly population.*

## I. Introduction

In the not too distant past, the three of us were having a conversation about an upcoming presentation. We planned to use appellate opinions to illustrate the progress made in fighting the financial exploitation of older persons over the time we have been working in the field.<sup>1</sup> Dr. Teaster, ever the academic and researcher, suggested that we consider publishing on this topic, and out of her suggestion, this Article was developed.

According to the National Adult Protective Services Association (NAPSA),<sup>2</sup> researchers began studying responses to elder abuse in the 1980s. In the 1980s, “[r]esearchers perceived elder abuse as a more easily identified subject for study, and a more dramatic issue to present to legislators and the public.”<sup>3</sup> A result of this focus on elder abuse was less visibility of Adult Protective Services (APS); although states kept providing APS services, “as state laws evolved, definitions became increasingly state specific, as did the programs.”<sup>4</sup>

For years now, or so it seems, when referencing the current state of elder abuse, the comment made was that the response to elder abuse is where responses to domestic violence and child abuse were twenty years ago.<sup>5</sup> We continue to make this statement, but the

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1. We had determined informally that between the three of us, we have a combined ninety years of experience.

2. NAT’L ADULT PROTECTIVE SERVS. ASS’N, <https://www.napsa-now.org> (last visited Oct. 9, 2017).

3. *History: About Adult Protective Servs. from 1960 to 2000*, NAT’L ADULT PROTECTIVE SERVS. ASS’N, <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/> (last visited Oct. 9, 2017).

4. *Id.*

5. See, e.g., David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 501 (RJ Bonnie & RB Wallace eds., 2003).

time gap never seems to lessen. It always seems to be twenty years behind. Does that signal a lack of progress in the response to elder abuse issues? Is there an increase in the number of prosecutions for financial exploitation? We decided to answer the question by compiling a list of appellate opinions involving the prosecution of financial exploitation. Our goal is simple: to see if there is an increase in the number of appeals over time. A subsidiary goal is a little more detailed, that is, whether insights might be gained from looking at these cases, especially for prosecutors.

This is not a scientific study; indeed, there is subjectivity to our research.<sup>6</sup> We ran the phrase “financial exploitation” in a commercial

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(“Efforts to understand and deal with abuse of the elderly by family members or other caregivers are reminiscent of where the study of child abuse and woman abuse was 20 years ago. Although there is still much to be done in terms of detection and investigation in these two related fields, knowledge gained from past and recent efforts may benefit current intervention planning in elder abuse.”); *see also Introduction, in ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 9, 12 (Richard J. Bonnie & Robert B. Wallace eds., 2002) (“Research on elder mistreatment is in an early stage . . . . The prevailing understanding of the problem, and the social response to it, have gradually emerged over the past half-century, shaped by evolving social responses to child protection and family violence as well as by an intensifying concern about neglect and victimization of vulnerable elderly people.”) [hereinafter *Introduction*]; Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings, in ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 102 (Richard J. Bonnie & Robert B. Wallace eds., 2002).

6. For example, in reviewing the appellate opinions, we needed to decide whether or not the case was mainly about financial exploitation of an older person. It is not unusual for a prosecutor to charge multiple counts against a defendant, including financial exploitation and other crimes. *See, e.g.* BRENDA K. UEKERT ET AL., NAT’L CENTER FOR STATE COURTS, PROSECUTING ELDER ABUSE CASES: BASIC TOOLS & STRATEGIES 7–8 (2012), <https://www.bja.gov/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf> [hereinafter UEKERT ET AL.]; *The Prosecutor’s Resource on Elder Abuse*, AEQUITAS 32 (Apr. 2017), <http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf> (discussing charging decisions) [hereinafter AEQUITAS].

If we felt that the case wasn’t really focused on financial exploitation, we did not include it for our analysis. As well, some state statutes encompass vulnerable adults rather than just specifically financial exploitation of elders. As a result, we don’t believe we captured all appeals of financial exploitation prosecutions, but we do believe we captured a representative sample that allowed us to determine whether there has been an increase in prosecutions over time.

It is also possible in some instances the act of financial exploitation led to a civil matter, such as a guardianship or other litigation, but there was no reported prosecution. We hope to author a subsequent companion article focusing on cases where the central issue is misuse of a power of attorney. We incorporated quotes from court opinions in this article more than we would otherwise as we felt it important to use the courts’ own characterizations of the matters.

legal database, specifically in the state databases for criminal courts. Law students created a spreadsheet of the results.<sup>7</sup>

We recognize there are limitations to focusing on appellate opinions of prosecutions to answer our question.<sup>8</sup> Because we only focused on appeals, our results do not capture trial court opinions, whether convictions or acquittals. We acknowledge that many criminal cases are resolved through plea agreements, thus we miss those cases because our focus was on appellate opinions. Because criminal prosecutions involve the state pursuing the case against a defendant, we did not look at any agency opinions, whether state or federal.<sup>9</sup>

We were reviewing appellate cases involving prosecution for financial exploitation, and so we assumed there would be some state statutes criminalizing financial exploitation.<sup>10</sup> It is important to note that some state statutes, such as California,<sup>11</sup> do not use the specific phrase "financial exploitation." Other states, such as New York, do not have a statute that makes financial exploitation of an elder a crime.<sup>12</sup>

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7. This spreadsheet is available from the Authors. The cases on the spreadsheet cover a gamut of issues on appeal. As noted above, our goal was to include only cases in which financial exploitation was a significant part of the case.

8. See *Introduction, supra* note 5. There are limitations on relying on reported case samples in order to capture the extent of the problem:

It is widely recognized that reported cases are highly selective samples, and that there is a large reservoir of unreported and undetected cases of elder mistreatment about which very little is known. Although unreported cases may be similar to reported cases, they also may be quite different. Samples of reported cases may suggest common patterns and correlates of mistreatment, especially when paired with a control group, but the data must be interpreted with great care.

*Id.* (noting problems with relying only on reported cases, not necessarily a good cross-section are the focus; the information comes from professionals rather than victims; and the data collected may have limited value).

Note, however, that the National Academies use of the term "case" is not used in the same context as we use "case," which is the prosecution filed charges against the defendant, there was a decision, and an appeal of that decision. However, the point that is made in the above excerpt applies as well to the legal cases.

9. Other than including *Mosher v. Dep't. of Inspections & Appeals*, 671 N.W.2d 501 (Iowa 2003), discussed *infra* notes 69–80 and accompanying text.

10. We were focused on the appellate opinions, not the underlying statutes. According to one study, there are thirty-six states that specifically criminalize financial exploitation. Kevin E. Hansen et al., *Criminal and Adult Protection Financial Exploitation Laws in the United States: How Do the Statutes Measure up to Existing Research?*, 42 MITCHELL HAMLINE L. REV. 897, 912 (2016) (listing the states) [hereinafter Hansen et al.].

11. See CAL. PENAL CODE § 368 (2017).

12. See, e.g., N.Y. PENAL LAW § 155.05 (2017) (defining larceny as "person steals property and commits larceny when, with intent to deprive another of property or

As a result, we concede that our findings are limited, but we maintain that the results show an overall increase in the number of prosecutions.<sup>13</sup>

For this Article, we first look at the basic elements needed for a crime and the development of financial exploitation laws in the United States. Then, we provide some examples of appellate opinions, organized by decade. Finally, we examine some of the specific issues in some of the opinions, describe some resources for prosecutors, and offer some suggestions for going forward.

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to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof"); *see also* N.Y. PENAL LAW §§ 155.35–155.42 (2017) (grand larceny); Hansen et al., *supra* note 10, at 918 (listing fourteen states, including New York, without specific financial exploitation criminal statutes).

13. For example, we asked Paul Greenwood, Deputy District Attorney, and Head of Elder Abuse Prosecution Unit for the San Diego District Attorney's Office who, in our opinions, is one of the top prosecutors of, and experts on, elder financial exploitation prosecution. We asked him whether he thought there were more cases filed in California than in other states. Email from Paul Greenwood to Authors (May 16, 2017) (on file with Authors) [hereinafter Interview: Greenwood]. He offered this anecdote:

I don't have any data to provide an accurate answer. All I can safely say is that I do believe that San Diego County probably files more cases of criminal elder financial exploitation than any other California county. I base that theory on the fact that we have been prosecuting such cases for 21 years and have built up an excellent working relationship with APS and with law enforcement and to some extent with some local financial institutions. We spend a lot of time promoting community awareness of the problem; and APS has a 24/7 reporting line. Why California may emerge as the nation's leader in such criminal prosecutions is because back in 2007 every bank teller became a mandated reporter of suspected financial elder exploitation . . . . Also, over time we have drawn more courage for filing such cases because of prior guilty verdicts. It takes a little bit of momentum to create a steady trickle followed by a flood!

*Id.* We also asked Candace Heisler, former assistant district attorney, consultant, and trainer, about whether she thought there were increases in prosecution. She offered this insight: "It has become a priority for an increasing number of prosecution agencies. Some offices have created specialized prosecution units that vertically prosecute (same prosecutor handles the case from beginning to end and works with the victim)." She also mentioned an increase in reporting resulting from better public education and awareness and legislative efforts that have led to the creation of new or enhanced crimes and/or expanded the number of mandated reporters. Interview with Candace Heisler (June 5, 2017) (notes on file with Authors) [hereinafter Interview: Heisler].

## II. The Law's Response to Financial Exploitation: The Generalities of Making It a Crime.

The Elder Justice Act<sup>14</sup> defines financial exploitation as the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.<sup>15</sup>

A state may have a statute or statutes that treat financial exploitation as a civil matter,<sup>16</sup> a crime,<sup>17</sup> or both.<sup>18</sup> For a statute that makes financial exploitation a crime, just like other crimes, there is a definition of the crime and a purpose for making the act a crime.<sup>19</sup> Each crime has elements that make up the crime, and the elements of the crime are proven by the evidence presented at trial. Since financial exploitation might be considered a type of theft,<sup>20</sup> the elements generally and broadly speaking would be three-fold.<sup>21</sup> First, the act is

14. 42 U.S.C. §§ 1397j–1397m-5 (2018).

15. 42 U.S.C. § 1397j(8) (2018).

16. See *Elder Justice Financial Exploitation Statutes*, DEP'T. OF JUSTICE, ELDER JUSTICE INITIATIVE, [https://www.justice.gov/elderjustice/prosecutors/statutes?field\\_statute\\_state=All&field\\_statute\\_category=3&=Search](https://www.justice.gov/elderjustice/prosecutors/statutes?field_statute_state=All&field_statute_category=3&=Search) (last visited Oct. 9, 2017) (searchable by state and category of civil or criminal) [hereinafter *EJFE Statutes*]; see also, e.g., WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 1.3 (2d ed. Oct. 2016 update) (discussing commonalities and differences in civil and criminal laws, in part because of their different purposes) [hereinafter *LAFAVE*].

17. See, e.g., CODE OF ALA. § 38-9-7 (2017); FLA. STAT. § 825.103 (2012); IDAHO CODE ANN. § 18-1505 (2017); see *EJFE Statutes*, *supra* note 16.

18. See *EJFE Statutes*, *supra* note 16 (showing for example, the Florida APS statute provides that a civil action can be pursued against the perpetrator, FLA. STAT. § 415.111, while the criminal statute criminalizes the act, FLA. STAT. § 825.103).

19. See, e.g., LAFAVE, *supra* note 16, at § 1.2 (citations omitted) (“The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability.”).

20. See, e.g., N.Y. PENAL LAW §§ 155.05, 155.35–155.42 (showing New York does not have a specific financial exploitation statute and instead that these types of crimes are prosecuted under the larceny statute).

21. See *generally* MODEL PENAL CODE § 1.13(9) (discussing the elements of the offense, noting conduct, or attendant circumstances or the conduct's results . . . “is included in the description of the forbidden conduct in the definition of the offense; or . . . (b) establishes the required kind of culpability . . . .”); see also LAFAVE, *supra* note 16, at § 1.2 (citations omitted) (providing that “[c]onduct . . . is used in a broad sense to cover two distinct matters: (1) the act, or the omission to act where there is a duty to act; and (2) the state of mind which accompanies the act or omission. Thus, the definition of a particular crime will spell out what act (or omission) and what mental state is required for its commission. Furthermore . . . the definition of a particular crime may require, in addition to an act or omission and a state of mind, something in the way of specified attendant circumstances;

against the property, or *actus reus*, such as the taking or converting of another's money or property.<sup>22</sup> Second, a criminal statute on financial exploitation will typically acknowledge the perpetrator's mental state in committing the crime, with language such as "knowingly" or "intentionally."<sup>23</sup> And third, because this crime involves a specific victim type, the attendant circumstances, the statute may address the age of the victim, the vulnerability of the victim, or both.<sup>24</sup>

The prosecutor must decide the charges to be brought against the defendant.<sup>25</sup> At trial, the prosecution has the burden of proving

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and with some crimes the definition also requires a specified result of the act or omission. As the above definition of substantive criminal law implies, conduct cannot be called "criminal" unless a punishment is prescribed therefor."). LaFave goes on to describe criminal law basic premises including: "the requirement of an act; generally, it may be said that conduct, to be criminal, must consist of something more than a mere bad state of mind . . . that conduct, to be criminal, must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required as well . . . that the physical conduct and mental state must concur . . . that the defendant's mental state must concur with his act or omission, in the sense that the former actuates the latter . . ." LAFAVE, *supra* note 16, at § 1.2 (citations omitted).

22. *Actus Reus*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) ("The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act . . . the actus reus for theft is the taking of or unlawful control over property without the owner's consent . . . . The voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the physical components of a crime.") [hereinafter Black's: Actus Reus].

23. See, e.g., COLO. STAT. § 18-6.5-102(10) (2017) ("[A]ct or omission . . . [u]ses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk person of the use, benefit, or possession of any thing of value . . . ."); FLA. STAT. § 825.103(1)(a) ("Knowingly obtaining or using, or endeavoring to obtain or use . . . with the intent . . . ."); 720 Ill. Comp. Stat. 5/17-56(a) (2017) ("knowingly and by deception or intimidation obtains control over the property . . . or illegally uses the assets or resources . . . ."); LAFAVE, *supra* note 16, at § 5.1(a)(1) ("Many statutes defining conduct which is criminal employ words . . . or phrases indicating some type of bad-mind requirement: "intentionally" or "with intent to . . ."; "knowingly" or "with knowledge that . . ."; "purposely" or "for the purpose of . . ."; "fraudulently" or "with intent to defraud"; "wilfully"; "maliciously"; "corruptly"; "designedly"; "recklessly"; "wantonly"; "unlawfully"; "feloniously" and so on. (2) Some of the statutes use words or phrases indicating a requirement of fault, but not necessarily mental fault—e.g., "negligently", "carelessly", or "having reason to know . . ." (3) Some statutes define criminal conduct without any words or phrases indicating any express requirement of fault; thus "whoever does so-and-so (or: whoever omits to do so-and-so) is guilty of a crime and subject to the following punishment . . . .").

24. See, e.g., FLA. STAT. § 825.101(4) (defining elder as 60 and over); see also FLA. STAT. § 825.103 (defining an elder or adult who is disabled).

25. See, e.g., UEKERT, ET AL., *supra* note 6, at 7–8; AEQUITAS, *supra* note 6, at 32 (discussing charging decisions).

the elements<sup>26</sup> of the crime with which the defendant is charged.<sup>27</sup> The prosecution must also present the evidence to show the defendant's guilt beyond a reasonable doubt.<sup>28</sup>

Recall that this Article is discussing the criminal prosecution of financial exploitation. As an aside, there may be a difference between consumer scams and financial exploitation prosecutions, depending on the language of the statute. Some financial exploitation statutes may require a caregiving or fiduciary relationship between the victim and the perpetrator,<sup>29</sup> while a consumer scam may not have that same requirement. However, the Department of Justice Elder Justice Initiative<sup>30</sup> correlates financial exploitation and financial scams.<sup>31</sup>

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26. *Burden of Proof*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) (defining burden of proof as "a party's duty to prove a disputed assertion or charge . . ."); *see also* LAFAVE, *supra* note 16, at § 1.8(b) ("prosecution has the burden of proving each of the various elements of the offense . . .") (citations omitted); 2A MOORE'S FED. PRACTICE & PROCEDURE § 403 (Criminal) (4th ed. 2015).

27. *See Reasonable Doubt*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) ("The doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty . . . '[b]eyond a reasonable doubt' is the standard used by a jury to determine whether a criminal defendant is guilty"); *see also* LAFAVE, *supra* note 16, at § 1.8(a) ("It is a basic policy of Anglo-American criminal law that, in view of the serious consequences which follow conviction of crime, the prosecution has the burden of proving beyond a reasonable doubt all the facts necessary to establish the defendant's guilt.") (citations omitted).

28. *See* MODEL PENAL CODE § 1.12(1) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."); *see also* LAFAVE *supra* note 16, at § 1.8(a); 2A MOORE'S FED. PRACTICE & PROCEDURE § 403 (Criminal).

29. FLA. STAT. § 825.103(1)(a)(1)–(2) (providing the perpetrator "[s]tands in a position of trust and confidence with the [victim]; or . . . [h]as a business relationship with the [victim] . . .").

30. *See* ELDER JUSTICE INSTITUTE (EJI), DEP'T OF JUSTICE, <https://www.justice.gov/elderjustice> (last visited Oct. 9, 2017).

31. *See, e.g., Financial Exploitation*, DEP'T OF JUSTICE, <https://www.justice.gov/elderjustice/financial-exploitation-1> (last visited Oct. 9, 2017); *see also Elder Abuse Resource Roadmap-Financial*, DEP'T OF JUSTICE, <https://www.justice.gov/elderjustice/roadmap> (last visited Oct. 9, 2017).

### III. Financial Exploitation Cases in the Courts

One of the challenges in examining the appellate opinions is the variation in definitions of financial exploitation.<sup>32</sup> We decided to use the phrase “financial exploitation,” as it is similar to the definition used by the Elder Justice Act, which as noted above concerns<sup>33</sup> “the fraudulent or otherwise illegal, unauthorized, or improper act . . . [regarding] the resources of an elder that benefits the perpetrator or somehow negatively impacts the ‘elder[s]’ . . . rightful access to, or use of, benefits, resources, belongings, or assets.”<sup>34</sup> Although some states may use different phrases, for consistency, in this Article, when we discuss the cases, we will use the phrase “financial exploitation.”

As noted briefly above, some fundamental criminal law principles come into play when considering acts that may be crimes. To start, it is important to look at the elements of the crime of financial exploitation to determine what types of acts make up the crime. The applicable statute provides the elements for the crime. Basic criminal law requires that the defendant possess both *actus reus*, or the criminal act,<sup>35</sup> and *mens rea*, the mental state.<sup>36</sup> Then, there are attendant circumstances in play.<sup>37</sup>

We selected eighty-nine cases when we ran our search.<sup>38</sup> We specifically looked for cases in which the only, or main, issue in the case concerned criminal financial exploitation.

As noted above, California and New York do not use “financial exploitation” in their statutes, but we felt their omission from this

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32. See, e.g., Hansen et al., *supra* note 10, at 899 (noting various definitions).

33. 42 U.S.C. § 1397j (2018).

34. 42 U.S.C. § 1397j(8) (2018).

35. Black’s: Actus Reus, *supra* note 22.

36. *Mens Rea*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) (defining “mens rea” as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . . The mens rea for theft is the intent to deprive the rightful owner of the property . . . . Mens rea is the second of two essential elements of every crime at common law, the other being the actus reus.); see also MODEL PENAL CODE § 2.02 (providing that the required levels of mens rea—expressed by the adverbs *purposely*, *knowingly*, *recklessly*, and *negligently*—are termed “culpability requirements . . . .”).

37. *Attendant Circumstances*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) (defining attendant circumstances: “[a] fact that is situationally relevant to a particular event or occurrence . . . . A fact-finder often reviews the attendant circumstances of a crime to learn, for example, the perpetrator’s motive or intent.); see also, e.g., LFAVE, *supra* note 16, at §§ 1.2, 5.1.

38. Those cases are included in a spreadsheet available from the Authors. We eliminated those cases that mentioned financial exploitation but it was not a main focus of the case on appeal.

Article would be too significant, and so we included them in this discussion. Although California has a financial exploitation statute, using a phrase other than “financial exploitation,”<sup>39</sup> New York is one of those states without a specific statute that makes financial exploitation of an elder a crime.<sup>40</sup> Thus, even though California and New York do not use the phrase,<sup>41</sup> we will discuss some cases from those two states, especially because of the two well-known cases from those states, the cases of Mickey Rooney<sup>42</sup> and Brooke Astor.<sup>43</sup>

#### A. The First Decade: Financial Exploitation Prosecution 1990–1999

As state legislatures started to enact elder abuse statutes,<sup>44</sup> it makes sense that there would eventually be appeals of cases in which charges were filed under those statutes. We included only four cases for this decade on our list.<sup>45</sup> Not unexpectedly, there were few appellate opinions during the first ten years of our results. Also, not unexpectedly, as prosecutors were charging under these new statutes, defendants would raise challenges to the constitutionality of such statutes.<sup>46</sup>

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39. See CAL. PENAL CODE § 368. California uses the phrase “financial abuse” or words to that effect.

40. See N.Y. PENAL LAW §§ 155.05, 155.35-155.42 (In New York, charges would be brought under the penal code sections dealing with larceny, theft, etc.); Heather Morton, *Financial Crimes Against the Elderly 2016 Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2016-legislation.aspx> (last visited Apr. 17, 2017). In the 2016 legislative session, A.B. 4467 and S.B. 1417 proposed the inclusion of financial exploitation of elders and people with disabilities within the definition of larceny. See generally Elizabeth Olson, *Declaring War on Financial Abuse of Older People*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/business/retirement/retirement-preventing-elder-abuse.html?r=1>.

41. See CAL. PENAL CODE § 368.

42. See, e.g., *Rooney v. Aber*, No. BS129686, 2011 WL 515473 (Cal. Super. Feb. 13, 2011); *Rooney v. Aber*, No. BS129687, 2011 WL 515474 (Cal. Super. Feb. 13, 2011) (petition for order of protection).

43. See *State v. Marshall*, 961 N.Y.S.2d 447, 447 (Sup. Ct. 2013).

44. See, e.g., Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 89–99, 105 (1998) (discussing various statutory responses).

45. See *Cuda v. State*, 639 So. 2d 22 (Fla. Dist. Ct. App. 1994); *State v. Dyer*, 607 So. 2d 482 (Fla. Dist. Ct. App. 1992); *State v. Layne*, 286 Ill. App. 3d 981 (1997); *State v. Simpson*, 268 Ill. App. 3d 305 (1994).

46. See generally LAFAVE, *supra* note 16, at §§ 3.1–3.3 (stating when the defendant challenges the constitutionality of a statute, the defendant will do so on certain grounds).

As an example, in one of the oldest criminal prosecution cases we examined, *Cuda v. State*, the Florida Supreme Court took up the question of the constitutionality of the then-applicable financial exploitation statute.<sup>47</sup> The defendant in that case claimed the statute was unconstitutional based on vagueness.<sup>48</sup> The court agreed because there was “no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good-faith defenses.”<sup>49</sup>

Another case decided that same year concerned the criminal act, as well as the attendant circumstances. An Illinois appellate court also took up the issue of the constitutionality of the applicable statute.<sup>50</sup> In *State v. Simpson*,<sup>51</sup> the defendant was convicted of financial exploitation of a person with a disability.<sup>52</sup> The defendant challenged the conviction on multiple grounds, including that the applicable statute was unconstitutionally vague.<sup>53</sup> The actions of the defendant, the victim’s insurance agent, included a purported sale of investments to the victim.<sup>54</sup> The defendant’s challenge was based on a lack of sufficient notice as to what conduct violated the statute.<sup>55</sup> In addition, the defendant claimed the statute was unclear regarding the meaning of “disabled person.”<sup>56</sup> The appellate court upheld the statute.<sup>57</sup> “[A] defendant’s knowledge or lack thereof to the victim’s medical condition is irrelevant to whether he is guilty of committing the offense.”<sup>58</sup> This is important because the court pointed out that the defendant does not really need to know the attendant circumstances,

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47. *Cuda*, 639 So. 2d at 22 (the statute in question was then FLA. STAT. § 415.111(5)).

48. *Id.* at 23–24 (challenging the use of “improper or illegal.” “[T]his statute purports to criminalize any “illegal” act in using or managing the funds of an aged person . . . . The statute violates due process because it is too vague to give notice. Furthermore, “the determination of a standard of guilt is left to be supplied by the courts or juries,” which is ‘an unconstitutional delegation of legislative power.’” (citations omitted)).

49. *Id.* at 25.

50. *Simpson*, 643 N.E.2d at 1262.

51. *Id.*

52. *Id.* at 1264.

53. *Id.*

54. *Id.* at 1264–65.

55. *Id.* at 1269.

56. *Id.*

57. *Id.* at 1267–70.

58. *Id.* at 1270.

that is, whether the victim was a vulnerable adult.<sup>59</sup> A statute in Florida takes a similar approach.<sup>60</sup> The Florida statute removes the defense of lack of knowledge of the age of the victim.<sup>61</sup> In Illinois, in *State v. Simpson*, it did not matter if the defendant knew about the victim's medical condition.<sup>62</sup>

As shown by the cases, the relationship of the perpetrator to the victim and the actions of the perpetrator can be important evidence for the elements of the crime. For example, another earlier Florida case concerned whether the defendant's actions were a crime.<sup>63</sup> *State v. Dyer*<sup>64</sup> discussed whether high pressure sales tactics by the defendant were the type of criminal act contemplated by the financial exploitation statute.<sup>65</sup> Although the defendant was charged with financial exploitation and grand theft, the financial exploitation count was dismissed, which was affirmed on appeal.<sup>66</sup> Why would high pressure sales tactics not meet the elements of the financial exploitation statute? The defendant's actions "[did] not involve use or management of the aged person's funds for profit."<sup>67</sup>

#### **B. The Second Decade: Financial Exploitation Prosecution: 2000–2009**

Moving to the next decade of search results, we noticed an uptick in the number of appellate opinions. We included a total of twenty-two cases on the spreadsheet.<sup>68</sup> Although some of the issues

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59. *Id.* ("As such, it is obvious that a defendant's knowledge or lack thereof about a victim's medical condition is immaterial to whether he commits the offense of financial exploitation of a disabled person.")

60. FLA. STAT. § 825.104 (defining a defendant's lack of knowledge of a victim's age as not a defense). *But see* *Jones v. State*, 161 So. 3d 412 (Fla. Dist. Ct. App. 2014). *Florida v. Nelson*, 577 So. 2d 971 (Fla. Dist. Ct. App. 1991) (discussing whether defendant had to know victim's age).

61. FLA. STAT. § 825.104; *see also Simpson*, 643 N.E.2d at 1270.

62. *Simpson*, 643 N.E.2d at 1270.

63. *State v. Dyer*, 607 So. 2d 482 (Fla. Dist. Ct. App. 1992) (affirming dismissal of exploitation charge under § 415.111(5)). ("The defendants['] high-pressure sales tactics or fraudulent schemes to convince older people to pay exorbitant prices for emergency response systems . . . may be 'exploitation' in a general sense, but it does not involve use or management of the aged person's funds for profit.")

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The appellate court noted that the defendant's conduct generally could be considered exploitation.

68. *State v. Woodburn, CA—CR 2006-0433-PR*, 2007 Ariz. App. Unpub. LEXIS 1142 (May 4, 2007); *State v. Cavanis*, No. A124910, 2009 WL 3530742 (Cal. Ct. App.

on appeal were similar to those in the first decade, we also saw some new issues being raised.

Although not a criminal prosecution, we felt it relevant to mention an appeal of an administrative agency opinion. In *Mosher v. Department of Inspection and Appeals*,<sup>69</sup> the administrative agency determined that the defendant, an employee of a skilled nursing facility (SNF) at which the victim resided, committed financial exploitation and the defendant was subsequently placed on an abuse registry.<sup>70</sup> The decision was reversed, and the determination expunged after the court reviewed the applicable statute.<sup>71</sup> The defendant in *Mosher* had sought a loan from the victim while the victim resided in a SNF; the victim subsequently moved out.<sup>72</sup> The defendant continued

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Oct. 30, 2009); *State v. Schneider*, No. H032628, 2009 WL 1491400 (Cal. Ct. App. May 28, 2009); *State v. Henning*, 173 Cal. App. 4th 632 (Apr. 29, 2009); *State v. Clites*, Nos. A115826, A116292, 2009 WL 206502 (Cal. Ct. App. Jan 29, 2009); *Hammermueller v. N. Am. Co. for Life & Health Ins.*, Nos. E041640, E045194, 2008 WL 4684773 (Cal. Ct. App. Oct. 23, 2008); *State v. Horvath*, No. F052817, 2008 WL 4061069 (Cal. Ct. App. Sept. 3, 2008); *Cohen v. Bank Leumi Le-Isr. (Switz.)*, No. B192859, 2007 WL 2938334 (Cal. Ct. App. Oct. 10, 2007); *State v. Hammock*, No. A117011, 2007 WL 2470097 (Cal. Ct. App. Aug. 31, 2007); *State v. Montesinos*, No. D048005, 2007 WL 1600484 (Cal. Ct. App. June 5, 2007); *State v. Cooper*, 148 Cal. Ct. App. 4th 731 (Feb. 15, 2007); *State v. Bates*, No. C050943, 2006 WL 3604352 (Cal. Ct. App. Dec. 12, 2006); *State v. Gray*, No. C04CR5247, 2006 WL 337732 (Cal. Ct. App. Feb. 15, 2006); *In re Michael C.*, No. F047924, 2005 WL 3471797 (Cal. Ct. App. Dec. 20, 2005); *State v. Branum*, No. F041070, 2003 WL 22073298 (Cal. Ct. App. Sept. 8, 2003); *State v. Green*, Nos. A089195, A093153, 2001 WL 1273470 (Cal. Ct. App. Oct. 23, 2001); *Marks v. State*, 280 Ga. 70 (2005); *State v. Campbell*, 756 N.W.2d 263 (Minn. Ct. App. 2008); *State v. Traxler*, A03-1047, 2004 Minn. App. LEXIS 855 (July 27, 2004); *State v. Coney*, C8-02-143, 2002 Minn. App. LEXIS 1072 (Sept. 24, 2002); *State v. Columbus*, No. C4-00-1950, 2001 WL 950097 (Minn. App. Aug. 2, 2001); *Jacks v. State*, No. 12-04-00355-CR, 2006 Tex. App. LEXIS 1968 (Mar. 15, 2006).

69. *Mosher*, 671 N.W.2d 501.

70. *Id.* at 503; see also NAT'L CENTER ON ELDER ABUSE (NCEA), ABUSE REGISTRIES AND CRIMINAL BACKGROUND CHECKS, <https://ncea.acl.gov/whatwe-do/practice/prevention-strategies.html> (last visited Oct. 9, 2017) (explaining that typically an elder abuse registry is considered to be "a list of perpetrators of substantiated incidents of elder abuse, and, in many instances, used to determine whether those individuals should be prohibited from working with certain vulnerable populations or in certain settings, such as a nursing home. Registries are often considered a prevention line of defense because people who are found to have abused a vulnerable adult or senior are flagged during a background check when applying for jobs"); see also *E.A.A. v. Comm'r of Health*, No. CX-01-5, 2001 WL 7668861, at \*1 (Minn. Ct. App. July 10, 2001) (indicating that defendant pleaded guilty to forgery of checks stolen from a 91-year-old victim living in a SNF and the state determined defendant was disqualified from working with residents under the applicable statute. The defendant committed maltreatment, which includes financial exploitation).

71. *Mosher*, 671 N.W.2d at 503-04.

72. *Id.* at 504.

contact with the victim, running errands, visiting, etc.<sup>73</sup> The victim loaned money to the defendant and her husband, later forgiving the debt.<sup>74</sup> After moving into a new SNF, the victim gave the defendant money to pay student loans and bought the defendant a car.<sup>75</sup> The victim moved from the second SNF, ended up in a hospital, and, when discharged, moved into a third SNF.<sup>76</sup> The victim's attorney contacted the state's version of protective services and after an investigation and hearing, the defendant was determined to have committed financial exploitation.<sup>77</sup> On appeal, the decision was reversed on the grounds that there was insufficient evidence that the victim met the definition of "dependent adult," and the defendant was not a caretaker under the statute since the defendant had left the employ of the facility; to be a crime, the defendant had to be the caregiver at the time of the victimization.<sup>78</sup>

As noted by the preceding case,<sup>79</sup> sufficiency of the evidence is not an unusual claim raised on appeal, since the prosecutor has the burden of proof.<sup>80</sup> The following cases also consider the sufficiency of the evidence.

*Marks v. State*<sup>81</sup> illustrates the importance of the acts, the defendant's mental state, and the attendant circumstances. The defendant was convicted of multiple counts stemming from financial exploitation.<sup>82</sup> The defendant and his companion (who claimed to be the defendant's niece) befriended the victim at a restaurant.<sup>83</sup> Subsequently, the defendant was with the victim for a significant number of hours each day, represented that he was an attorney, and convinced the victim to change his bank accounts and give the defendant jewelry and credit cards, among other actions.<sup>84</sup> The victim

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73. *Id.* at 504–05.

74. *Id.* at 505.

75. *Id.*

76. *Id.*

77. *Id.* at 506–07.

78. *Id.* at 518.

79. *See Mosher*, 671 N.W.2d at 503–04.

80. *See LAFAVE*, *supra* note 16.

81. 623 S.E.2d 504 (Ga. 2005).

82. *Id.* at 506–10. The defendant also challenged the constitutionality of the statute on grounds of vagueness and equal protection. As far as vagueness, the trial court found he lacked standing to challenge the statute and did not address the defendant's challenge. The court also found his equal protection argument lacking. The Georgia Supreme Court affirmed on appeal.

83. *Id.* at 506.

84. *Id.*

was persuaded to create a new will with the defendant's daughter as the sole beneficiary; the victim revoked his power of attorney; and the niece ultimately proposed marriage to the victim.<sup>85</sup> The victim bought a new car for the niece, signing the contract and paying the purchase price in cash.<sup>86</sup> The victim's friend, along with bank employees, became suspicious and contacted the state's attorney general.<sup>87</sup> After an investigation, the defendant was arrested and ultimately convicted.<sup>88</sup> On appeal, the court found there was sufficient evidence to affirm the conviction.<sup>89</sup>

Similarly, in *State v. Columbus*,<sup>90</sup> the defendant challenged her conviction on the sufficiency of the evidence, specifically the criminal act.<sup>91</sup> The defendant was the agent for the victim, pursuant to a power of attorney that gave the defendant "the right to make transfers to herself."<sup>92</sup> The victim, residing in a SNF at the time, had approximately \$73,580 in income, with a \$27,365 bill for the nursing home.<sup>93</sup> Although the defendant did use the money to pay the nursing home bill, she was late in doing so.<sup>94</sup> She also transferred the balance, more than \$45,000, to herself.<sup>95</sup> The victim revoked the power of attorney, naming another as the successor agent.<sup>96</sup> This successor agent found that the victim had an outstanding bill for the nursing home and no money to pay the bill.<sup>97</sup> After arranging a payment plan with the SNF, the new agent reported the defendant to the sheriff's office.<sup>98</sup> A subsequent investigation resulted in the defendant being charged with financial exploitation and theft.<sup>99</sup> Following a jury trial in which the defendant was convicted on both counts, the court suspended the

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85. *Id.* at 507.

86. *Id.*

87. *Id.*

88. *Id.* at 506–07. (The defendant was arrested at a bank in the company of the victim. The defendant's brief case "contained: the forged quitclaim deed which he had filed . . . the revoked power of attorney; approximately 40 blank checks from [the victim's] account . . . [the victim's] original will . . . and a statement from [the victim's] securities account . . . showing a value of \$151,185.60."); *Id.* at 507.

89. *Id.* at 510.

90. No. C4-00-1956, 2001 WL 950097 (Minn. Ct. App. Aug. 21, 2001).

91. *Id.* at \*1.

92. *Id.* (showing the victim lived in a nursing home).

93. *Id.*

94. *Id.*

95. *Id.* (showing the defendant spent the money she transferred to herself).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

sentence for financial exploitation and placed the defendant on probation.<sup>100</sup> The defendant's appeal was based on insufficient evidence, but the appellate court held that the jury "could have found that . . . [the defendant as the victim's agent] violated the statute" by failing to use the victim's money for his own care.<sup>101</sup> Not only that, the defendant exhausted all the victim's funds by transferring the balance to herself, leaving him without any money to pay for his care.<sup>102</sup>

Another appeal concerning the requisite sufficiency of the evidence of a criminal act came from California. In *State v. Horvath*,<sup>103</sup> the defendant was convicted under California Penal Code § 368(e), financial elder abuse by a caregiver.<sup>104</sup> The defendant challenged the sufficiency of the evidence, and the appellate court found that there was enough evidence presented to support a conviction of theft, whether by embezzlement or by larceny.<sup>105</sup> One might describe the defendant's relationship to the victim as close (although they are not related), but the court doesn't consider that as an excuse for the crime: "[the victim's] expression of fondness and loyalty toward appellant does not shield appellant from the criminal consequences of taking \$12,000 from [the victim] without [the victim's] prior approval."<sup>106</sup>

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100. *Id.* (showing the defendant also had to spend ninety days in jail, pay restitution in the amount of \$20 per month, complete community service (100 hours) and send the victim a letter apologizing).

101. *Id.* at \*2.

102. *Id.*

103. No. F052817, 2008 WL 4061069, \*1 (Cal. Ct. App. Dist. Sept. 3, 2008).

104. *Id.* at \*1-8 (showing there was extensive evidence regarding the actions of the defendant regarding the money that the victim "gave" the defendant).

105. *Id.* at \*9-11. Appellant, agent under a financial power of attorney, took the checks the victim had signed in blank and deposited them into his own account rather than using them to pay the victim's bills. As well the defendant "was losing large sums of money at two casinos . . . [which] provides a strong motive for appellant's theft of Anderson's funds." *State v. Schlick*, 846 N.Y.S.2d 128, 129 (2007). As mentioned earlier, New York does not use a separate financial exploitation statute. Instead prosecution is brought under the larceny statute. The defendant was convicted of second degree grand larceny. The defendant was found guilty of "taking large sums of money from an elderly woman after she had become mentally incompetent." *Id.* Although evidence was offered of the victim's prior authorization for the defendant to spend the victim's money to benefit himself, that failed to give the defendant any actual or implied authority to continue to do so after the victim no longer had capacity. *Id.* The court found that "[e]ven if defendant believed that the victim, had she remained competent, would have continued the pattern of gifts, this would not have entitled [the defendant] to unilaterally take her money after she was no longer capable of choosing to give it away." *Id.*

106. *Horvath*, 2008 WL 40610668 at \*10.

A second California case concerned the sufficiency of the evidence regarding the defendant's mental state. In *State v. Johnson*,<sup>107</sup> an unreported California appellate case, the defendant was the caregiver and, later, was convicted of murder due to neglect, causing the deaths of her two step-brothers.<sup>108</sup> The connected financial elder abuse counts were based on her embezzlement of her brothers' monthly disability checks, as the defendant received a small monthly check to care for her step-brothers.<sup>109</sup> The defendant challenged her embezzlement conviction on a lack of sufficient evidence for the conviction under California Penal Code § 368(e),<sup>110</sup> specifically the element of intent.<sup>111</sup> She argued that the money was to compensate her for providing their care.<sup>112</sup> The appellate court was not persuaded by the argument, especially because the defendant had access to the bank accounts and was in charge of the finances for the home.<sup>113</sup> Since the defendant was given a monthly check specifically for caring for her step-brothers, she was not entitled to any more funds.<sup>114</sup> Referencing the poor (or lack of) care the defendant provided to her step-brothers, the appellate court concluded that the jury could have "reasonably inferred that defendant was not spending their disability benefits to care for their needs."<sup>115</sup>

In another unreported appellate case from California, the defendant's prior acts were used to show the defendant's mental state. In *State v. Bates*,<sup>116</sup> the defendant was convicted under California Penal Code § 386(d) (non-caregiver).<sup>117</sup> The victim, suffering from dementia, had named his son as agent under a power of attorney.<sup>118</sup> The young woman who was hired to clean for the victim had introduced the victim to the defendant.<sup>119</sup> The defendant became close to the victim, and, with the help of the young woman, ultimately married the

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107. No. E037089, 2006 WL 709856 (Cal. Ct. App. Mar. 22, 2006).

108. *Id.* at \*1.

109. *Id.* at \*3.

110. *Id.* at \*13.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at \*14. The defendant "was given \$334 per month for her services, the rest of the money should have been used for her stepfather's and stepbrothers' care." *Id.*

115. *Id.*

116. No. C050943, 2006 WL 3604352, at \*25 (Cal. Ct. App. Dec. 12, 2006).

117. *Id.* at \*1.

118. *Id.* at \*2.

119. *Id.* at \*3-4.

victim.<sup>120</sup> One of the defendant's points on appeal was the trial court's allowing evidence of previous instances of financial elder abuse.<sup>121</sup> "[I]t is logical to infer a disposition toward elder theft and grand theft based on a prior act of elder financial abuse," and it was not an abuse of discretion to admit those into evidence.<sup>122</sup>

In New York, the defendant in *State v. Rampersaud*<sup>123</sup> was convicted of first-degree grand larceny.<sup>124</sup> The defendant, the victim's home health aide, knew that the victim lacked capacity to complete financial transactions.<sup>125</sup> The defendant was convicted of taking over \$1.5 million from the victim.<sup>126</sup> The defendant established an alleged joint account with the victim, but the court found the defendant was never a lawful joint owner of the account,<sup>127</sup> and thus the criminal act was the defendant taking the victim's money.

The mental state of the defendant, as well as the defendant's relationship with the victim, can be very telling. In *State v. Campbell*,<sup>128</sup> the state appealed the trial court's holding that the financial

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120. *Id.* at \*5–6.

121. *Id.* at \*16–17.

122. *Id.* at \*22 ("Both the past acts and current act involved men substantially older than defendant who were financially secure and had lost their wives either by divorce or death. Defendant befriended both men when they were in need of care, married them, interfered with their conservatorship proceedings, and violated court orders limiting or prohibiting contact with them. The prior acts therefore tended to show a characteristic method, plan, or scheme, and shed light on defendant's motive, intent, and knowledge in committing the charged crimes."); *see also* *State v. Watson*, 7 Cal. Rptr. 3d 295, 296–97 (Cal. Ct. App. 2003) (indicating the charges were based on home improvement scam against four elder owners) ("Defendant was accused of taking money from these elderly victims by means of false pretenses and misrepresentations, and of entering their homes with the intent to commit theft by false pretenses.").

123. 861 N.Y.S.2d 284 (N.Y. App. Div. 2008).

124. *Id.* at 337.

125. *Id.*

126. *Id.* ("[T]he victim neither participated in nor authorized any of the transactions whereby the defendant appropriated over \$1.5 million of the victim's funds. The evidence of the defendant's larcenous intent was also overwhelming.").

127. *Id.* (noting the argument by the defendant that the account and transactions could not have been done without a mistake by a bank teller); *State v. Mills*, 793 N.Y.S. 2d 228, 229 (N.Y. App. Div. 2005) (charging the defendant with multiple counts under the larceny statute for the use of both the victim's checks and credit cards. The defendant pleaded to 4th degree grand larceny and the trial court sentenced the defendant to a one to three-year concurrent sentence, although the pre-sentence report recommended a lesser sentence. The appellate court affirmed, "considering the reprehensible nature of the defendant's crimes, involving the exploitation of the elderly.").

128. 756 N.W.2d 263 (Minn. Ct. App. 2008).

exploitation statute was unconstitutional.<sup>129</sup> The defendant, one of two sons of the victim, had previously served as a financial crimes investigator for the local police department.<sup>130</sup> After the victim's health declined because of dementia, the defendant arranged for the victim to sign a new power of attorney with gifting authority, naming the defendant as agent.<sup>131</sup> The victim also opened new checking and savings accounts with her own funds, placing the defendant's name on them.<sup>132</sup> The court reviewed the facts of the case to determine if there was a fiduciary relationship, including the expenditures the defendant made with the victim's money.<sup>133</sup> The court concluded that a "person in his position would have had substantial reason to believe that he was in a fiduciary relationship as stated in [the statute] and that the statute is not unconstitutionally vague as applied to the facts at hand."<sup>134</sup> The court considered phrases from the statute in particular,<sup>135</sup> and, as far as fiduciary relationships, the court held that fiduciary commitments could arise from a joint account but may not always be a part of one.<sup>136</sup>

The court used the existence of the joint account as the beginning for its analysis since that shows what the court describes as a "financial relationship"—the chances of abuse exist with the unfettered ability to make withdrawals although creating a joint account demonstrates that the parties trust each other to some degree; it's not just the existence of the joint account alone since there

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129. *Id.* at 266–68 (holding the statute as applied to defendant unconstitutionally vague. After the jury was unable to reach a verdict and before a new trial, the statute was held unconstitutional.).

130. *Id.* at 267.

131. *Id.* at 272.

132. *Id.* at 267 ("The state introduced evidence that, between February 2003 and September 2004, respondent exhausted the joint accounts . . . [and] within ten days after respondent received a copy of the POA appointing him attorney-in-fact for his mother, respondent closed the joint savings account and withdrew \$18,048.48 from the joint checking account for his use.") The defenses were typical, including that the victim consented, that the funds were used to benefit the victim ("a significant portion of the money was used to build an addition to his home that included a living space which L.C. would have used had her health allowed") and that he would get it anyway at the victim's death ("as the only other person on the joint accounts he would succeed to any remaining balances upon L.C.'s death."). *Id.*

133. *Id.* at 270.

134. *Id.* at 273 (citations omitted).

135. *Id.* at 270 (challenging the phrases "in breach of a fiduciary obligation recognized elsewhere in the law" and "intentionally fails to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, [etc.]").

136. *Id.* at 271.

are other aspects to consider in deciding if there is a fiduciary arrangement such as the parties' relationship, their knowledge and ability, whose money is in the account and in what percentage, and the expectations and conclusions the parties hold about the arrangement and their duties.<sup>137</sup> In the trial, "the existence of a fiduciary relationship is a factual determination . . . . Although the determination requires a judgment call, it is not so inherently elusive that it is not reasonably ascertainable or that it cannot be established beyond a reasonable doubt."<sup>138</sup>

### C. The Third Decade: Financial Exploitation Prosecutions: 2010–2016

In this current decade, there has been a definite increase in the number of appellate opinions.<sup>139</sup> We included a total of sixty-three cases on our spreadsheet.<sup>140</sup> We found cases concerning the

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137. *Id.* at 271–72.

138. *Id.* (The defendant claimed, among other things, insufficient evidence. The Minnesota appellate court affirmed his conviction as to the financial exploitation, finding sufficient evidence to show a fiduciary relationship and a breach of that relationship and the defendant proceeded without the victim's consent.).

139. There were sixty-three cases from 2010-2016, compared to four from 1990-1999 and twenty-two from 2000-2009.

140. *State v. Lane*, No. 2 CA-CR 2012-0210, 2013 WL 1453065 (Az. Ct. App. Apr. 9, 2013); *State v. Giles*, No. 2 CA-CR 2010-0059, 2011 WL 1529961 (Az. Ct. App. Apr. 19, 2011); *State v. Halloum*, No. 2 CA-CR 2010-0152-PR, 2010 WL 3860626 (Az. Ct. App. Sept. 30, 2010); *State v. Cabbage*, N041393, 2016 WL 6781091 (Cal. Ct. App. Nov. 16, 2016); *State v. Moore*, D066952, 2016 WL 3644658 (Cal. Ct. App. June 30, 2016); *State v. Leach*, C080051, 2016 WL 3636561 (Cal. Ct. App. June 29, 2016); *State v. Champlin*, A140705, 2016 WL 3227394 (Cal. Ct. App. June 3, 2016); *State v. Wright*, E063340, 2016 WL 661488 (Cal. Ct. App. Feb. 18, 2016); *State v. Soto*, F068397, 2015 WL 7736924 (Cal. Ct. App. Dec. 1, 2015); *State v. Pitchie*, D066752, 2015 WL 7074851 (Cal. Ct. App. Nov. 13, 2015); *State v. Ellsworth*, C076034, 2015 WL 2155462 (Cal. Ct. App. May 8, 2015); *State v. Ashton*, E059462, 2015 WL 189071 (Cal. Ct. App. Jan 14, 2015); *Rodriguez v. Acciani*, B237238, B238916, 2014 WL 5427507 (Cal. Ct. App. Oct. 27, 2014); *State v. Sikivou*, B248545, 2014 WL 3686246 (Cal. Ct. App. July 25, 2014); *State v. Downer*, D063255, 2014 WL 1398970 (Cal. Ct. App. Apr. 10, 2014); *State v. James*, C071374, 2013 WL 5621636 (Cal. Ct. App. Oct. 15, 2013); *Soriano v. Chew*, H038003, 2013 WL 4813360 (Cal. Ct. App. Sept. 10, 2013); *State v. Liu*, B23580, 2013 WL 4483515 (Cal. Ct. App. Aug. 22, 2013); *State v. Alonzo*, D 0 5 9 1 4 9 , 2013 WL 427735 (Cal. Ct. App. Feb. 5, 2013); *State v. Castor*, H037867, 2013 WL 239398 (Cal. Ct. App. Jan. 23, 2013); *State v. Galliher*, D058702, 2012 WL 2851197 (Cal. Ct. App. July 12, 2012); *State v. Hays*, A129351, 2011 WL

challenges to the statute or questions regarding the meaning of the words used in the statute.<sup>141</sup> For example, in *State v. Browning*,<sup>142</sup> the case involved whether the defendant's act was a crime, and the

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6739409 (Cal. Ct. App. Dec. 22, 2011); *State v. Wyskiver*, D057974, 2011 WL 1744244 (Cal. Ct. App. May 4, 2011); *State v. Courtney*, 2d Crim. No. B213837, 2011 WL 1502464 (Cal. Ct. App. Apr. 21, 2011); *State v. Porter*, F057076, 2011 WL 1246673 (Cal. Ct. App. Apr. 5, 2011); *State v. Youug*, C062858, 2010 WL 4891010 (Cal. Ct. App. Dec. 2, 2010); *State v. Brewster*, A125486, 2010 WL 4727876 (Cal. Ct. App. Nov. 19, 2010); *State v. Eastburn*, 189 Cal. App. 4th 1501 (2010); *Franke v. State*, 188 So. 3d 886 (Fla. Dist. Ct. App. 2016); *Javellana v. State*, 168 So. 3d 283 (Fla. Dist. Ct. App. 2015); *State v. Chin*, 134 Hawai'i 134 (Haw. Ct. App. 2014); *State v. Chenoweth*, 25 N.E.3 612 (Ill. 2015); *State v. Gridley*, No. 2-14-1093, 2015 WL 8773238 (Ill. App. Ct. Dec. 14, 2015); *State v. Doggett*, No. 4-12-0773, 2014 WL 576303 (Ill. App. Ct. Feb. 11, 2014); *State v. Ford*, Nos. 4-12-0591, 4-12-0592, 2013 WL 1140489 (Ill. App. Ct. Mar. 19, 2013); *State v. Owsley*, 996 N.E.2d 118 (Ill. App. Ct. 2013); *State v. Chenoweth*, 996 N.E.2d 1258 (Ill. App. Ct. 2013); *State v. Hoard*, No. 1-11-1274, 2013 WL 3357841 (Ill. App. Ct. June 28, 2013); *State v. Gayle*, No. 4-10-0132, 2012 WL 7007700 (Ill. App. Ct. Mar. 21, 2012); *State v. Bailey*, 409 Ill. App. 3d 574 (2011); *State v. Duffy*, No. 3-09-0580, 2011 WL 10458111, (Ill. App. Ct. Feb. 23, 2011); *State v. Davis*, No. 3-10-0124, 2011 WL 10468064 (Ill. App. Ct. Aug. 3, 2011); *State v. McDonald*, No. 5-10-0211, 2011 WL 10501231 (Ill. App. Ct. Dec. 27, 2011); *Greczek v. State*, No. 45A04-1202-CR-62, 2012 Ind. App. Unpub. LEXIS 1216 (Sept. 25, 2012); *Horst v. State*, 975 N.E.2d 853 (Ind. Ct. App. 2012); *State v. Ahart*, No. 108,086, 2013 WL 5303521 (Kan. Ct. App. Sept. 20, 2013); *Wallace v. State*, 2009-SC-000659-MR, 2011 Ky. Unpub. LEXIS 20 (Mar. 24, 2011); *Home v. State*, No. 1903, Sept. Term, 2015,2016 WL 6664895 (Md. Ct. Spec. App. Nov. 10, 2016); *State v. St. Hilaire*, 470 Mass. 338 (2015); *State v. Sargent*, No. A14-1130, 2015 WL 648440 (Minn. Ct. App. Feb. 17, 2015); *State v. Lewis*, No. A12-1994, 2013 WL 4504383 (Minn. Ct. App. Aug. 26, 2013); *State v. Campbell*, No. A11-1847, 2012 WL 6554410 (Minn. Ct. App. Dec. 17, 2012); *State v. Holiway*, 465 S.W.3d 542 (Mo. Ct. App. 2015); *State v. Livingston-Rivard*, 461 S.W.3d 463 (Mo. Ct. App. 2015); *State v. Edwards*, 456 S.W.3d 105 (Mo. Ct. App. 2015); *State v. Johnson*, 287 Neb. 190 (2014); *State v. Bevil*, 280 Or. App. 92 (2016); *State v. Browning*, 282 Or. App. 1 (2016); *State v. Bartholomew*, No. CR-599-2014, 2015 Pa. Dist. & Cnty. Dec. LEXIS 2906 (Pa. C.P. Oct. 8, 2015); *State v. Carman-Thacker*, No. M201400757CCAR3CD, 2015 WL 1881135 (Tenn. Crim. App. Apr. 24, 2015); *State v. Cooper*, No. E2011-00590-CCA-R3-CD, 2012 WL 950103 (Tenn. Crim. App. Mar. 20, 2012); *State v. Evans*, No. 69842-7-I, 2014 WL 1600578 (Wash. Ct. App. Apr. 21, 2014); *State v. Bluem*, 329 Wis. 2d 270 (Wis. Ct. App. 2010).

141. See, e.g., *Ford*, 2013 WL 1140489; *Ahart*, 309 P.3d at 9; *Browning*, 282 Or. App. at 1.

142. 282 Or. App. 1 (2016).

defendant was charged with multiple counts of "criminal mistreatment"<sup>143</sup> under the applicable Oregon statute.<sup>144</sup> In *Browning*, the defendant, using powers of attorney from his mother and his mother-in-law, made multiple withdrawals, which he claimed were loans.<sup>145</sup> Because the defendant was using the defense of loans, the issue was over the meaning of the language in the statute, specifically the use of the words "takes" and "appropriates" and whether a temporary taking is covered by the statute or if a permanent taking is required.<sup>146</sup> Distinguishing this statute from the theft statute, the court noted that the elements were different.<sup>147</sup> Looking at the plain meaning of the words, comparing the words in the criminal mistreatment statute to that of the theft statute, and looking at the legislative intent for the criminal mistreatment statute, the court determined that the deprivation under the statute did not have to be permanent.<sup>148</sup> The court concluded that the statute covered instances in which "a caregiver for an elderly person takes money from the elderly person's bank account, without consent, for a purpose other than the execution of the caregiver's responsibilities to the elderly person."<sup>149</sup>

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143. *Id.* at 2 ("[A] person commits first-degree criminal mistreatment if the person, having assumed the care of an elderly person, 'intentionally or knowingly' 'takes' or 'appropriates' the elderly person's money or property for 'any use or purpose not in the due and lawful execution of the person's responsibility.'").

144. *Id.*

145. *Id.*

146. *Id.* at 3.

147. *Id.* at 5 ("[A]lthough theft requires an intent to permanently deprive another of property, criminal mistreatment does not." Further, the criminal mistreatment statute was enacted some years after the theft statute and "the criminal mistreatment provision does not include a requirement that a person act 'with intent to deprive another of property or to appropriate property to the person or to a third person.'" The court emphasized the significance of that; if the legislature wanted to include the intent requirement, it would have been written into the statute.)

148. *Id.* at 7-8 (discussing legislative intent. "The legislators intended to craft a statute . . . with the goal of making . . . [the statute] broad enough to capture exploitative acts, but not so broad that it would also capture voluntary distributions of property by elderly persons or other persons acting in a manner consistent with a caretaking or supervisory role . . . . [This] . . . demonstrates that the legislature intended [the statute] to apply to the exercise of dominion or control over an elderly person's money or property, without the elderly person's voluntary consent, for a purpose not in the due and lawful execution of the person's responsibility. The dominion or control may be intended to be temporary or permanent.").

149. *Id.* at 8.

Another case, an unpublished opinion from a Kansas appellate court,<sup>150</sup> focused on the defendant's actions and considered the constitutionality of the applicable statute.<sup>151</sup> In particular, the defendant was challenging two phrases in the statute—the terms “unfair advantage” and “undue influence.”<sup>152</sup> The defendant served as a long-term caregiver for the decedent.<sup>153</sup> There was evidence that, for more than a decade and a half, the defendant gradually assumed control over the finances of the decedent and his wife.<sup>154</sup> This included the victims changing their agents under financial powers of attorney, making changes to their wills, providing the defendant with access to their checking accounts, and the defendant even employing her family and friends to help around the house.<sup>155</sup> There was also evidence that the defendant played upon the decedent's anxieties, among other things, to drive a wedge between the decedent and his family.<sup>156</sup> The defendant claimed that the statute was unconstitutionally vague.<sup>157</sup> Mistreatment of a dependent adult under the statute includes what would be considered financial exploitation.<sup>158</sup>

Applied to the facts of this case, the concepts of “unfair advantage” and “undue influence” can be understood by someone with common intelligence. We will not set out all of the facts of . . . [the defendant] case here; the parties are familiar with the evidence. But there can be no reasonable doubt that those terms described the conduct [the defendant] was charged with.<sup>159</sup>

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150. *State v. Ahart*, 2013 WL 5303521 (Kan. Ct. App. Sept. 20, 2013).

151. *Id.* at \*1.

152. *Id.* at \*3.

153. *Id.* at \*1.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at \*3 (The statute “defined mistreatment of a dependent adult as: knowingly and intentionally . . . *taking unfair advantage* of a dependent adult's . . . financial resources for another individual's personal or financial advantage *by the use of undue influence*, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person.” . . . [the decedent] was a dependent adult within the meaning of the statute . . . .” (emphasis in original)).

159. *Id.* at \*5 (Within two years of the defendant working for the victim, the victim named his son as agent under a durable power of attorney. Over time, the defendant's relationship with the victim's son deteriorated when the son would not make a fraudulent tax report for her and then the victim changed his agent from his son to the defendant. The defendant “began to write large checks to cash . . . [and] hired a variety of close friends and relatives . . . including her daughter” whose salary nearly quadrupled over 9 years in addition to “receiv[ing] a single \$100,000 check (written out by Ahart and signed by Smith) . . . .” The defendant's

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In addition... there was specific evidence showing that [defendant] had intentionally worked to spend the... [decedent and his wife's] assets so that the Smiths' children would get nothing.<sup>160</sup>

In this case, the court found the evidence to be compelling and upheld the conviction.<sup>161</sup>

The defendant's mental state was a focus in another unpublished case, this one from an Illinois appellate court.<sup>162</sup> The defendant challenged his conviction<sup>163</sup> of financial exploitation of his elderly mother, on, among other grounds, the constitutionality of the statute.<sup>164</sup> The "[d]efendant argue[d] the offense of financial exploitation of the elderly violates due process because it subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge."<sup>165</sup>

The court examined the requirements of the statute which "requires more than mere knowledge to be found guilty of the offense... [it] requires a defendant knowingly use the assets or resources of an elderly person illegally.... [This] can include misappropriation of the assets by a breach of a fiduciary relationship...."<sup>166</sup>

Many cases in this third decade still concern issues regarding evidence. For example, the Oregon appellate court in *State v. Bevil*,<sup>167</sup>

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granddaughter's salary more than tripled over 8 years, with the salaries set by the defendant. "As a result, the victims' assets dropped by almost \$3.5 million.)

160. *Id.* The victims' other son provided testimony about comments from the defendant's daughter and granddaughter regarding her intent to wipe out the assets so the sons would receive nothing and further that the defendant threatened to tell Mr. Smith that his children planned to move him into a nursing home despite his express desires to the contrary.

161. *Id.* at \*1, \*5-6 ("Although there may be cases at the margin in which a closer question would be presented, this is not such a case. And '[a] statute is not to be struck down as vague only because marginal cases could be put where doubts might arise.'"). Here there was compelling evidence.

162. *See* *People v. Ford*, No. 4-12-0592, 2013 WL 120591-U (Ill. App. Ct. Mar. 19, 2013).

163. *Id.* at ¶ 32 ("Defendant knew he would need additional funds each month once Patricia's insurance ran out so he found a job with the circus. Defendant... used some of the money to pay down his debt and to live on... [and] transferred money out of Patricia's account into his own to protect the money from being taken by his son.")

164. *Id.* at ¶¶ 7, 35.

165. *Id.* at ¶ 40.

166. *Id.* at ¶¶ 43-44 (citations omitted).

167. 376 P.3d 294, 295-96 (Or. Ct. App. 2016) (stating defendant started in the elder's employ as a groundskeeper and ultimately became her caregiver)

considered whether a caregiver could accept gifts from the elder, even if there was no wrongdoing on the caregiver's part.<sup>168</sup> The defendant argued it was not the intent of the statute to criminalize conduct that was not wrongful and the appellate court agreed.<sup>169</sup> (The trial court had agreed with the state that the statute's intent was to criminalize all gifts to caregivers.<sup>170</sup>) The appellate court carefully examined the language of the section of the statute, especially the meaning of the word "take."<sup>171</sup> The court distinguished financial exploitation from gifts given voluntarily, noting that the legislative history demonstrates that

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"[D]efendant was her primary social contact, arranged all of her appointments, including medical appointments, and handled her finances—including accompanying her to the bank, filling out the payee line of checks for her signature, and arranging the sale of real property. Howser introduced defendant as her "nephew" to make it easier for him to participate in discussions with Howser's doctors and financial advisers, and defendant did the same."

*Id.* at 297–98.

During the first interview with a detective, the defendant claimed to not have received large gifts but later admitted to receiving \$100,000. *Id.* at 296. The detective subsequently confronted the defendant with proof of multiple checks worth \$260,000 and a search of his premises turned up a \$161,000 cashier's check. *Id.*

Further, evidence at trial showed "that Howser was in poor health, was forgetful at times, and was largely dependent on defendant for her physical care...had been careful with her finances before meeting defendant, and that the large checks to him, and other expenditures in which he was involved, were inconsistent with her previous habits." *Id.* The defendant presented conflicting evidence about her financial acumen and generosity. *Id.* at 297. Being that she had "no natural heirs, [she] had gifted money to defendant because she considered him like family." *Id.*

168. *Id.* at 295.

169. *Id.* ("[D]efendant argues that the statute was not intended to create a strict-liability crime for caretakers . . . who knowingly receive gifts from persons in their care. The state . . . argu[ed] that the legislature could have exempted gifts from its reach but instead 'enacted a much broader statute, which prohibits *any* taking of money for *any* purpose outside of caretaking duties regardless of the existence of consent.'")

170. *Id.* at 298. The trial court reasoned that

[I]n this particular instance and in this relationship, that these simply cannot be seen as lawful gifts and are, in fact, a product of the relationship in the nature that was precisely that, that the legislature was intended—intending to prevent from working to an elderly or dependent person's disadvantage . . . ." "[A]ll that needs to be demonstrated here is that the defendant understood and knew that he had accepted the care, custody, responsibility for the supervision of . . . a dependent and elderly person, and that he took money of hers for a purpose other than that related to her care.

*Id.*

171. *Id.* at 299–300.

the intent of the statute was not to criminalize a voluntary gift from an elder to her caregiver.<sup>172</sup>

[T]he legislature was sensitive to the ability of competent persons to “consent” to spending their money as they chose, and it would not have understood the word “take” in [the statute] to sweep so broadly that it intruded on that freedom of choice. Thus, we hold that a person does not “take” property for purposes of [the statute] when that property is gifted with the voluntary consent of its owner.<sup>173</sup>

In the New York case of *State v. Card*,<sup>174</sup> the defendant, an assisted living facility housekeeper, was convicted of third degree grand larceny for stealing the victim’s jewelry.<sup>175</sup> Because the victim died before the trial, the victim’s son testified by using photos of the jewelry that were kept under lock and key.<sup>176</sup> He discovered the jewelry missing when his mother was hospitalized.<sup>177</sup> In addition to challenging the sufficiency of the evidence, the defendant challenged the sentence as punitive and disproportionate.<sup>178</sup> The appellate court affirmed the sentence because the defendant had a lengthy criminal history, “showed no remorse and [violated] trust by victimizing a vulnerable elderly person . . . .”<sup>179</sup>

In *State v. Hayes*,<sup>180</sup> the victim, diagnosed with dementia,<sup>181</sup> signed a power of attorney with gifting authority with her nephew as agent.<sup>182</sup> The attorney met with the victim, her sister, and nephew together, never meeting with the victim alone.<sup>183</sup> The defendant appealed the court’s denial of his motion for acquittal following a mistrial.<sup>184</sup> Regarding the charge of financial exploitation, the

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172. *Id.* at 300 (“If anything, the legislative history reflects a sensitivity toward protecting the free will of elderly or dependent persons to spend their resources according to their desires . . . . The subcommittee agreed to adopt language similar to the California statute, with the understanding that it resolved the full committee’s concerns about the language requiring ‘express voluntary consent.’”).

173. *Id.* at 301.

174. 981 N.Y.S.2d 827 (Sup. Ct. App. Div. 2014).

175. *Id.* at 828.

176. *Id.*

177. *Id.* at 829. Testimony showed that the defendant was able to enter the apartment. A friend of the defendant involved in selling the stolen jewelry testified about the defendant telling her about finding the jewelry. Other friends of the defendant testified about the defendant’s conduct and admissions.

178. *Id.*

179. *Id.*

180. No. 66-CR-08-368, 2011 WL 2749880 (Minn. Ct. App. July 18, 2011).

181. *Id.* at \*1.

182. *Id.* at \*2.

183. *Id.*

184. *Id.* at \*3.

defendant argued the prosecution lacked evidence demonstrating intent because the victim had executed a power of attorney with gifting powers.<sup>185</sup> The court considered the impact that the dementia diagnosis had on the execution of the power of attorney and that the defendant, even if he did not have actual knowledge of the diagnosis, would have known his aunt lacked capacity to sign the power of attorney.<sup>186</sup>

In *State v. St. Hilaire*,<sup>187</sup> a case that involves both *actus reus* and *mens rea*, the Massachusetts Supreme Court considered the evidence presented in the defendant's trial for larceny.<sup>188</sup> The defendant, the victim's neighbor, had an acrimonious relationship with her late husband, and, as the victim's health declined, managed to acquire ownership of the victim's property.<sup>189</sup> The defendant challenged the

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185. *Id.* at \*4.

186. *Id.* (noting the applicable statute presumes a power of attorney is valid unless there is actual knowledge of the power of attorney not being validly executed).

187. 21 N.E.3d 968 (Mass. 2015).

188. *Id.* at 970–71, 973–74. The elements for larceny are similar to those of financial exploitation. The larceny statute provides “Whoever steals or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another, sixty years of age or older . . . shall be guilty of larceny . . . .” This provision of the statute is identical to G.L. c. 266, § 30(1), 4 except for the specification of an enhanced penalty for larceny of the property of persons sixty years of age or older.” *Id.* at 973–74 (citations omitted). “[T]he victim . . . sold her property to the defendant. At the time of the transaction, the victim was an eighty-six-year-old widowed nursing home resident.” *Id.* at 970. The defendant's appeal was based on two points: “whether, as the judge ruled, the crime of larceny may be proved by evidence that (1) the victim lacked the mental capacity to understand the transaction she entered into with the defendant; and (2) the defendant knew or should have known that she lacked such capacity.” *Id.* at 970–71.

189. *Id.* at 971–73. The defendant was a building inspector in the town and had previously expressed interest in acquiring the victim's house, which the victim vehemently opposed. The victim was admitted into a SNF for post-surgery therapy and a SNF employee did a capacity assessment, concluding the victim lacked capacity to execute documents. As the victim's condition worsened, she was heavily medicated and unable to communicate. The defendant visited the victim at the SNF, asking the victim to sign documents, the contents of which were not known to her, according to the staff. Although the victim was represented by an attorney, the defendant, a witness and a notary visited the victim and in the presence of the victim's roommate, “the defendant hand[ed] a document to the victim. Without explaining the contents, the defendant asked the victim to sign the document . . . [which] she did.” *Id.* Within a short period of time, the victim died and the document turned out to be a quitclaim deed that transferred the property to the defendant. During the subsequent investigation, the defendant claimed that the victim had agreed to sell her house, was aware and knew what she was doing. The only document signed by the victim was a quitclaim deed; the defendant prepared that as well as other documents himself. The defendant didn't pay the

conviction by claiming consent<sup>190</sup> and the Massachusetts Supreme Court focused on two elements of the statute—intent and unlawful taking.<sup>191</sup> The victim's mental capacity, or lack thereof, was relevant in this case, because if the victim lacked capacity, then she could not have consented to the sale.<sup>192</sup>

As to the second issue on appeal, the court determined that the defendant must have known that the victim lacked capacity to consent to the sale.<sup>193</sup> The court reversed and remanded the case for a new trial in which the state would have to "prove beyond a reasonable doubt a specific intent to steal by evidence that the victim lacked the mental capacity to consent to the transaction and that the defendant knew that she lacked the mental capacity to consent to the transaction."<sup>194</sup>

Similarly, in another Illinois appellate opinion, *State v. Bailey*,<sup>195</sup> the defendant was convicted of, among other things, financially exploiting a victim with dementia, using both a general and a durable power of attorney.<sup>196</sup> The defendant was found guilty of the financial exploitation counts, as well as other counts, with the court finding some witnesses credible and others not.<sup>197</sup> Although the power of attorney was suspect, it did create a fiduciary relationship.<sup>198</sup> The court also found that the victim not only failed to consent but lacked the capacity to consent.<sup>199</sup> At sentencing, the court heard evidence and

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victim and promptly changed the locks to the house so the victim's agent and her attorney were unable to get into the house.

190. *See id.* at 973–77.

191. *Id.* at 973–74.

192. *Id.* at 977.

193. *Id.* at 977–78 ("Where, as here, a defendant asserts a claim of right defense that allows for an honest, but mistaken, belief in the defendant's legal right to take property, we hold that it is not enough that the Commonwealth prove that the defendant should have known of the victim's incapacity. Instead, if the defendant meets his or her burden of production, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that the victim lacked the mental capacity to consent to the transaction.").

194. *Id.* at 979.

195. 948 N.E.2d 690 (Ill. App. Ct. 2011).

196. *Id.* at 690, 695–96. Victim with dementia, in her 90s, saved over \$300,000. Using a terminated power of attorney and a durable power of attorney, within a year the defendant had her entire savings and with the worsening dementia, the victim lacked the ability "to understand and manage her financial affairs . . ." *Id.*

197. *Id.* at 701.

198. *Id.*

199. *Id.*

arguments on aggravation and mitigation.<sup>200</sup> The defendant appealed, among other grounds, challenging the issue of the victim's ability to consent, the power of attorney, and the excessiveness of the sentence.<sup>201</sup>

Consent can be a typical defense in financial exploitation cases.<sup>202</sup> In *Franke v. State*,<sup>203</sup> the defendant argued "gift," which meant the defendant was claiming no criminal act occurred and a lack of criminal mental intent.<sup>204</sup> The court examined the theories under the statute and noted that "[b]oth theories rely on the common element that [the defendant] obtained or endeavored to obtain [the victim's] property."<sup>205</sup> The appellate court reversed and remanded the case for discharge because the defendant asserted the defense of gift, which was not contradictory with the evidence.<sup>206</sup>

In *Bailey*, an Illinois appellate case discussed earlier, the court affirmed the trial court's decision regarding the victim's dementia; the trial court was not wrong in holding "beyond a reasonable doubt that [the victim's] dementia prevented her from providing the defendant with the ok to use the victim's funds."<sup>207</sup> As far as the defendant's argument that the power of attorney provided her a safe harbor, the appellate court found that, because the victim was unable to consent for at least a year prior to the transactions in question, the defendant

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200. *Id.* ("[T]he trial court sentenced defendant to 13 years' incarceration . . . for counts I through VII and 7 years' incarceration . . . for count VIII, with both sentences to be served concurrently. Defendant moved to reconsider the sentence and the court reduced defendant's sentence on counts I through VII to 11 years' incarceration. At this time, the court also vacated defendant's convictions for counts VII and VIII under the one-act, one-crime doctrine.").

201. *Id.* at 701, 704–06.

202. See AEQUITAS, *supra* note 6, at 38.

203. 188 So. 3d 886, 887 (Fla. Dist. Ct. App. 2016). The defendant, long-time friend of the victim, worked at a brokerage firm where the victim was a client, and developed what has been described as a mother-daughter relationship. *Id.* at 887. The victim had previously had her attorney prepare a SNT, a revocable trust, and power of attorney and when her attorney was out of town, asked the defendant for an attorney, with whom she met and changed the trustee and residuary beneficiary to the defendant (because her sons were already provided for in the SNT. The defendant told the victim she couldn't serve as trustee, so the victim amended the trust to make that change but the defendant remained as the residuary beneficiary. *Id.* at 887.

204. *Id.* at 888.

205. *Id.*

206. *Id.* at 888–89. The state failed to present evidence contrary to defendant's argument of innocence. The defendant did not "obtain or endeavor to obtain [victim's] property" since victim made her beneficiary as gift. *Id.* See also *Javellana v. State*, 168 So. 3d 283 (Fla. Dist. Ct. App. 2015).

207. *Bailey*, 948 N.E.2d at 707.

should have known that the victim lacked the capacity to consent to the transactions.<sup>208</sup> "The record supports the trial court's finding that [the victim] did not authorize [the defendant] to deplete her life savings."<sup>209</sup> The sentence imposed on the defendant fell within the sentencing guidelines, and the trial court properly considered aggravating factors.<sup>210</sup>

In *State v. Livingston-Rivard*,<sup>211</sup> the defendant challenged the conviction on evidentiary grounds and on the sufficiency of the evidence to support the elements of financial exploitation.<sup>212</sup> The defendant's position was that her statements did not satisfy the statutory meaning for "deception, intimidation, undue influence, or force."<sup>213</sup> In affirming the conviction, the appellate court noted that the defendant made false statements that resulted in the victim giving her significant property without adequate consideration and those statements were made with the intent to mislead the victim. Since the victim and his wife made transfers of their home and their vehicles to the defendant for consideration of \$100, that "evidence [was] sufficient such that a reasonable trier of fact could infer Defendant made a misrepresentation which induced Victim to enter into an agreement to transfer his property to her."<sup>214</sup> The statute in *Livingston-Rivard* does not mandate that the defendant make a misrepresentation to the

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208. *Id.*

209. *Id.*

210. *Id.* at 708–10 (noting the defendant had a large sum of money waiting for her since some of the money was never accounted for, and the defendant had refused to consent to medical treatment for the victim and refused to consent to adequate pain management for the victim).

211. 461 S.W.3d 463, 465 (Mo. Ct. App. 2015). The victim, in his 80s, attempted suicide subsequent to worsening health and a diagnosis of Alzheimer's and dementia. After the victim's discharge to his home, the defendant, "a barmaid at a local VFW" befriended the victim. *Id.* Victim's next-door neighbor overheard the victim and defendant talking with the defendant telling victim that "he and his wife needed to transfer their property to Defendant so the state would not take it away when Victim and his wife had to enter a nursing home." *Id.* The neighbor also saw the victim with a large amount of cash; the victim wasn't going to put the money in a bank in order to keep it out of the defendant's possession. A third conversation with the neighbor revealed the victim telling her that the defendant had taken all of his money.

As far as the victim's property, the victim sold the defendant his van for \$100 and gave the defendant their mobile home and a car. *Id.* When the nephew challenged the defendant about the transfers, the defendant falsely claimed to have been appointed to care for the victim. *Id.*

212. *Id.* at 464, 466–68.

213. *Id.* at 467.

214. *Id.* at 467–68.

victim.<sup>215</sup> Instead, the statute's language requires that the defendant take control over the victim's assets in one of four ways: "deception, intimidation, undue influence, or force."<sup>216</sup> The statute simply requires that the state shows "that deception was used, not necessarily that the defendant lied directly to the victim."<sup>217</sup>

The Supreme Court of Kentucky considered many issues on appeal in the unpublished opinion of *Wallace v. State*,<sup>218</sup> in which the daughter was convicted of murder, neglect, and exploitation of her mother.<sup>219</sup> For the financial exploitation conviction, the defendant argued insufficient evidence, specifically regarding the victim's consent.<sup>220</sup> The Kentucky Supreme Court noted the victim's limited consent, the victim's dementia, and the statements of the defendant supported the conviction.<sup>221</sup>

In *State v. Gayle*,<sup>222</sup> an unreported Illinois appellate court case, the defendant was convicted of one count of elder financial exploitation and one count of financial exploitation of a person with disabilities.<sup>223</sup> The defendant raised several points in appealing her conviction on two counts, including sufficiency of the evidence and hearsay.<sup>224</sup> The appellate opinion offered a detailed recitation of the witnesses' testimony<sup>225</sup> before turning to the issues raised by the defendant on appeal.<sup>226</sup> On the question of whether the state met its

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215. *Id.* at 468.

216. *Id.*

217. *Id.* at 467.

218. No. 2009-SC-000659-MR, 2011 WL 1103330 (Ky. Mar. 24, 2011).

219. *Id.* at \*1-2 During the investigation, the detective found that within five months, the victim's bank account balances had been moved to the checking account of the defendant along with most of the money in the victim's checking account. At the same time the defendant's spending had increased three-fold when compared to the preceding time period.

220. *Id.* at \*12.

221. *Id.* ("Although [the defendant] testified that she had her mother's permission to spend her money, she admitted at trial that she exceeded her mother's permission by "a whole lot." The defendant "testified, 'I took the permission she gave me and went overboard on it'" which the court determined demonstrated the defendant "obtained [the victim's] money through "deception . . . or similar means, with the intent to deprive . . . [the victim] of those resources.").

222. No. 4-10-0132, 2012 WL 7007700 (Ill. App. Ct. Mar. 21, 2012).

223. *Id.* at ¶ 2.

224. *Id.* at ¶ 100 (stating the defendant's conviction for two counts resulted in a four-year prison sentence per offense, served concurrently as well as restitution in the amount of \$400,000, with a thousand dollar fine and one day monetary credit towards the fine for time served).

225. *See id.* at ¶¶ 5-99.

226. *See id.* at ¶¶ 104-136.

burden of proof beyond a reasonable doubt, the appellate court examined the language of the statute regarding the role of undue influence in proving financial exploitation.<sup>227</sup> The court agreed with the state that the statute allowed for proof of financial exploitation either by undue influence or a breach of a fiduciary relationship.<sup>228</sup> As far as the defendant's Sixth Amendment confrontation clause claim,<sup>229</sup> the court found that the out-of-court statement was not offered to prove the truth of the matter asserted, that the defendant stole the victim's money, but instead was offered as a reason why the victim changed her will and no longer wanted contact with the defendant.<sup>230</sup>

In *State v. Hoard*,<sup>231</sup> another unreported Illinois appellate court case, after the defendant was convicted of financial exploitation,<sup>232</sup> the defendant appealed on six grounds, including sufficiency of the evidence.<sup>233</sup> The sufficiency of the evidence issue concerned the part

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227. *Id.*

228. *Id.* at ¶¶ 110–11. The defendant was the agent under the power of attorney previously signed by the victim. The victim, "in her late 80s and early 90s" at the time in question was in a frail condition, extremely vulnerable and reliant on the caregiver for 24/7 care for over two years." *Id.* at ¶ 110. "Dr. Smith called [the relationship] 'unhealthy and pathologic.'" *Id.* "[The victim] abandoned her decades-long conservative approach in giving to begin giving away sizable chunks of her estate to defendant and defendant's family. [The victim's] new approach would have left her penniless in a short time. [The victim] no longer understood the assets in her estate or the amounts she was giving away. *Id.* A reasonable and likely inference is that undue influence was used . . ." *Id.* As well, since the defendant was agent under the victim's power of attorney, the defendant was a fiduciary and as a result had a concomitant "duty to 'use due care to act for the benefit' of [the victim]" which duty the defendant breached. *Id.* at ¶ 111. Extensive gifting was exhausting the victim's estate which would have resulted in the victim losing her home. *Id.* The defendant used the victim's funds to buy a car for a friend, to have her home cleaned and to purchase cashier's checks, all of which was for the defendant's own benefit rather than the victim's. *Id.*

229. *Id.* at ¶ 124 (showing the defendant challenged the testimony of one witness who stated that the victim told the witness that the defendant had stolen money from the victim as a reason why the victim made changes to her will and didn't want to be around the defendant any further).

230. *Id.* at ¶ 129.

231. No. 1-11-1274, 2013 WL 3357841, at ¶ 1, ¶¶ 4–10 (Il. App. Ct. June 28, 2013). The victim was 95 at the time of the opinion. The defendant over a five-month period financially exploited her grandmother, the victim. The grandmother had significant vision problems so documents were hard for her to read. After a fire in her home that required her to move in with her daughter, the victim relied on her granddaughter for help. The defendant had her sign a number of documents, including a power of attorney naming the defendant as agent, and a quitclaim deed transferring title of her house to the defendant. The defendant also appropriated the payout from the insurance company.

232. *Id.* at ¶ 2.

233. *Id.*

of the statute that required the defendant to “knowingly and by deception” gain control over the victim’s property.<sup>234</sup> Looking at the applicable statutes, the court determined that the defendant, in fact, deceived the victim.<sup>235</sup> Specifically addressing the bank account opened with insurance proceeds, the appellate court noted that the trial court found that the defendant’s explanation lacked credibility and further that creation of the joint account showed the defendant doing whatever it took to obtain the victim’s money with the evidence showing “that the State presented strong evidence of defendant’s use of a false pretense in order to induce or encourage [the victim] to enter into the various agreements, which constitutes deception under the broad statutory definition . . . .”<sup>236</sup>

In this decade, there were two additional issues that we thought deserved mentioning: (1) the time within which charges must be filed, and (2) the sentences imposed. Two Illinois cases focused on the time by which charges must be filed. In the Illinois Supreme Court case, *State v. Chenoweth*,<sup>237</sup> the defendant was convicted of financial exploitation and sentenced.<sup>238</sup> The defendant, the victim’s step-daughter, held her power of attorney.<sup>239</sup> The victim, after moving into a nursing home, directed the defendant to sell her house, which was done, but only some of the sale proceeds were deposited in the victim’s checking account.<sup>240</sup> A subsequent change of agent, a report

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234. *Id.* at ¶ 27.

235. *Id.* at ¶¶ 29–31. Ms. Dorsey, in her 90s and with poor eyesight and whose home had burned, relied on her granddaughter to help her with the myriad issues arising from the fire, to attempt to get the roofing contractor to give her money, and to use the insurance money to buy a new home. *Id.* at ¶ 31. Instead, the granddaughter had her sign “a very broad power of attorney, a quitclaim deed granting the fire-damaged home to defendant, and a general agreement gifting nearly all the insurance proceeds to defendant.” *Id.* The font on some of these documents was small and the defendant did not explain the documents to Ms. Dorsey. *Id.*

236. *Id.* at ¶¶ 32–33 (showing that the evidence showed that the defendant used the insurance proceeds for her own benefit).

“[D]efendant had transferred large sums of money out of that account and had herself used a debit card associated with that account. This evidence constituted strong circumstantial evidence that defendant was improperly using the funds in the joint account for her own purposes, and was trying to conceal this fact from [the victim].”

*Id.* at ¶ 34.

237. 25 N.E.3d 612 (Ill. 2015).

238. *Id.* at 614 (demonstrating the defendant received four years of probation plus restitution).

239. *Id.*

240. *Id.* at 614.

to law enforcement, and an investigation resulted in charges being brought against the defendant on December 21, 2009.<sup>241</sup> The defendant claimed the charges were brought after the statute of limitations had run,<sup>242</sup> but the trial court disagreed.<sup>243</sup>

The Illinois Supreme Court examined the statute to determine the actions that commenced the running of the statute.<sup>244</sup> The question was the meaning of the phrase, "discovery of the offense" within the applicable statute.<sup>245</sup> The court discussed the differences between becoming aware of a loss, a suspicion a crime has been committed, and discovery of an offense.<sup>246</sup> A mere suspicion is not the same as knowledge of a crime.<sup>247</sup> The court also factored in the power of attorney and how its existence would affect the discovery of the offense.<sup>248</sup> The court found that the limitations period began to run when the district attorney received the police case file; that is, when the district attorney became aware of the crime.<sup>249</sup>

Similarly, in the Illinois appellate court decision, *State v. Gridley*,<sup>250</sup> the phrase "discovery of the offense" was at issue.<sup>251</sup> Applying the Illinois Supreme Court decision, the appellate court concluded that when "the state's attorney received the police investigation file and became aware of the offense that . . . [the] limitations period began to run."<sup>252</sup>

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241. *Id.* at 614–15.

242. *Id.* at 615–16.

243. *Id.* at 616 ("The circuit court . . . found that the extended limitations period commenced on January 22, 2009, when the police report was delivered to the Adams County State's Attorney, and defendant was indicted within one year of that date.").

244. *Id.* at 616–17.

245. *Id.* at 618.

246. *Id.* at 618–19.

247. *Id.* at 619–20.

248. *Id.* (The court concluded that the extended statute of limitations applied here. The court recognized that the law required that the principal "[know] only that defendant might be liable for negligent exercise of a duty of due care." Here the victim has a suspicion that the defendant's act was criminal but did not know it.) The court stated that

[t]he purpose of the statute was to allow an extension of the statute of limitations for those crimes 'which are capable of being readily concealed by the offender, from both the victims and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.'

*Id.*

249. *Id.*

250. No. 2-14-1093, 2015 WL 8773238 (Ill. App. Ct. Dec. 14, 2015).

251. *Id.* at ¶ 31.

252. *Id.* at ¶ 42.

The second issue, sentencing, is an interesting question in financial exploitation prosecutions because of the different approaches taken in the statutes. Some state statutes make the crime of financial exploitation more serious because the victim is an elder or vulnerable adult.<sup>253</sup> Consider those approaches in *State v. Sargent*,<sup>254</sup> a Minnesota appellate court case, in which the trial court entered a downward departure of the sentence, which the state appealed.<sup>255</sup> The defendant served as fiduciary for her father<sup>256</sup> and, using her fiduciary authority, almost exhausted his bank accounts, taking the proceeds for her personal gain.<sup>257</sup> After the defendant entered a plea, the court sentenced her for a gross misdemeanor rather than a felony, a downward departure.<sup>258</sup> A sentence under the guidelines was viewed as proper, and no deviation would be allowed unless “there [were] ‘identifiable, substantial, and compelling circumstances’ that support[ed] a different sentence.”<sup>259</sup>

The appellate court determined that the trial court confused the crime and the sentence: “the district court mischaracterized the departure as a downward *dispositional* departure, both on the record and in the departure report. In fact, it is a downward *durational* departure because the duration of Sargent’s sentence was reduced by two-thirds, while the disposition of a stayed sentence was unchanged.”<sup>260</sup> Although the trial court explained its justification for departing from the guidelines, the appellate court found those

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253. The statute may enhance the time (the sentence is longer) or enhance the crime (increase the degree of the offense). See Hansen, et al., *supra* note 10, at 914 (noting twelve state statutes specifically referencing or offering “enhanced penalties for caregiver perpetrators have felony level penalties for those who commit this crime.” (Citations omitted)).

254. No. A14–1130, 2015 WL 648440 (Minn. Ct. App. Feb. 17, 2015).

255. *Id.* at \*1.

256. *Id.* at \*1–2 (taking the role of co-trustee, agent, caregiver under a personal services contract).

257. *Id.* (showing she also mortgaged the home that was to be inherited jointly with her brother, using the proceeds to pay off the mortgage of the home that she was to solely inherit).

258. *Id.* at \*3–4 (demonstrating the one-year sentence was stayed. The trial court’s downward departure appeared to be due to the defendant’s willingness to be placed on probation, her power to repay the victim, and her lack of prior convictions. The repayment had to be paid within a year, and the defendant agreed to a monthly repayment schedule.).

259. *Id.* at \*8.

260. *Id.* (emphasis in original).

reasons insufficient and invalid for this type of departure.<sup>261</sup> Finally, the court discussed the seriousness of the defendant's conduct; her conduct was as serious as a felony offense for financially exploiting a vulnerable adult, not a gross misdemeanor.<sup>262</sup> Without more to justify a departure, it was an error for the trial court to sentence her for a gross misdemeanor.<sup>263</sup>

In *State v. Duffy*,<sup>264</sup> an unreported Illinois appellate court decision, the daughter pled guilty to one count of financial exploitation.<sup>265</sup> The pre-sentence report noted the daughter's many problems,<sup>266</sup> the trial court sentenced the daughter to prison and restitution rather than probation.<sup>267</sup> Among the defendant's arguments on appeal was a challenge to the court's consideration of aggravating factors, arguing it was an error for the trial court to consider that the theft resulted in the mother moving from the private pay section of the ALF where she received amenities not available when her stay was then covered by public assistance.<sup>268</sup> The defendant also argued that her inability to make restitution was implied under the statute, and therefore, it was an error for the trial court to consider

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261. *Id.* at \*12. Here, the trial court also "double counted" the fact that the defendant had no criminal record since that was already factored into the guidelines.

262. *Id.* at \*19.

263. *Id.*

264. No. 3-09-0580, 2011 WL 10458111 (Ill. App. Ct. Feb. 23, 2011).

265. *Id.* at \*2. Daughter, agent under her mother's power of attorney, used her mother's money to pay her own living expenses. This came to light when the mother faced eviction from her assisted living facility.

266. *Id.* ("The PSI noted that defendant had no prior criminal history, four [adult] children . . . , a sporadic work history, . . . some classes at . . . Community College, . . . a 20-year history of mental illness, . . . has frequently been hospitalized in several mental health facilities [and] . . . attempted to commit suicide and has reported an inability to cope due to her limited finances.").

267. *Id.* at \*2. The trial court's justification for an increase in the sentence (aggravating factors) was six-fold:

The aggravating factors included repetition of the offense, the family could access social services, the court disbelieved the defendant's expressed remorse, the mother had to be moved from a private facility to a public one with less services available, restitution was unlikely and prison would serve as a deterrent.

*Id.*

268. *Id.* at \*3 (citing to a statute defining a person who has a disability, the Defendant's argument on appeal on this point seemed somewhat self-defeating. The defendant argued "that the trial court improperly considered the fact that defendant's actions resulted in [the mother] being evicted from the private section of the assisted living community. Defendant asserts that this risk is 'inherent in the offense of unlawful financial exploitation of the elderly.'").

as an aggravating factor.<sup>269</sup> The appellate court affirmed the sentence, noting the trial court's consideration of the factors was appropriate and that the sentence fell within the guidelines for this type of felony.<sup>270</sup>

As noted earlier, California does not use the phrase "financial exploitation" in its statute criminalizing financial elder abuse.<sup>271</sup> The statute references other statutes that prohibit certain conduct and then sets out the level of crime and sentence that apply when the crime is committed against an elder.<sup>272</sup> In *State v. Moore*,<sup>273</sup> an unreported appellate court opinion, one issue considered was whether the statute operated solely as an enhancement statute or establishes a separate offense.<sup>274</sup> The court took note of other cases in which the California Penal Code § 368(d) created a separate offense.<sup>275</sup> The court examined the legislative intent and the plain meaning of the words used in the statute, concluding that the statute created an offense.<sup>276</sup> The question then became whether a person is charged with multiple counts stemming from the same set of facts, and "[i]f the statutory elements of one offense include all of the statutory elements of another" could the defendant be found guilty for the two different offenses based on the same set of facts?<sup>277</sup> Here the defendant was convicted, among other counts, of theft and financial elder abuse,<sup>278</sup> and because the elements of theft were incorporated into the financial elder abuse statute, the conviction for grand theft was dropped.<sup>279</sup>

A somewhat similar issue was raised in *State v. Ellsworth*,<sup>280</sup> another unpublished California appellate court opinion. The defendant pled no contest to grand theft and financial elder abuse, among other

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269. *Id.* at \*4 (arguing the court erred in considering the exhaustion of assets and restitution unlikely since "permanent deprivation of the assets" was part of the language of the statute).

270. *Id.* (finding that the trial court, affirmed by the appellate court, determined that probation was not appropriate and that sentencing fell within the sentencing guidelines).

271. See *supra* notes 10–13 and accompanying text; CAL. PENAL CODE § 368.

272. See, e.g., CAL. PENAL CODE § 368(d)–(e).

273. 2016 WL 3644658, at \*1, \*5–6. There were multiple victims and several counts brought against the defendant. One of the victims was the former mother-in-law of the defendant.

274. *Id.* at \*26.

275. *Id.*

276. *Id.*

277. *Id.* at \*27.

278. *Id.* at \*1.

279. *Id.* at \*27.

280. No. C076034, 2015 WL 2155462 (Cal. Ct. App. May 8, 2015).

charges.<sup>281</sup> The defendant challenged the sentence of three years for the financial elder abuse, plus another eight months for grand theft, to run consecutively, as well as the one-year enhancement.<sup>282</sup> The appellate court found multiple sentences appropriate because these were separate crimes.<sup>283</sup> As the court noted,

[m]oreover, and notably relevant here, "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment . . . . This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one . . . ."<sup>284</sup>

As far as punishment, the sentence imposed may only be one part of the punishment. Remember that financial exploitation is a financial crime. In some instances, a defendant may be ordered to make restitution. What about a defendant who is ordered to make restitution but who fails to do so, fails to do so timely, or only makes partial restitution? In *State v. Bruun*,<sup>285</sup> the defendant had been ordered to make restitution, in monthly payments.<sup>286</sup> The court's order indicated, although the time for the payments to be made had expired, the obligation did not, and the order for restitution was still enforceable.<sup>287</sup>

The most famous case from New York,<sup>288</sup> and one of the most famous in the country,<sup>289</sup> is *State v. Marshall*.<sup>290</sup> A lengthy investigation, trial, and appeal concerned the financial exploitation by

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281. *Id.* at \*1.

282. *Id.* at \*2.

283. *Id.* ("Defendant's grand theft was completed in January of 2008 when she wrote the courtesy check against Billie's Capital One account. That act is separated in time (over three months) and objective from the elder theft, which she completed between May and August of 2008 by using the fraudulently obtained Discover card to acquire more than \$2,000 in cash and goods. For this reason, and because both crimes also involved separate criminal objectives, we conclude the trial court did not err in imposing multiple punishments.").

284. *Id.* at \*3.

285. 27 N.E.3d 1046 (Ill. App. Ct. 2015).

286. *Id.* at 1047 ("[D]efendant . . . made unauthorized loans of funds from the trust to a fledgling business that employed defendant as its chief executive officer; and (2) had withdrawn funds from the trust and used the funds for gambling and other personal purposes." Defendant was sentenced to two eight-year terms, running concurrently and ordered to pay over \$400,000 in restitution.).

287. *Id.* at 1048–50.

288. 961 N.Y.S.2d 447 (N.Y. App. Div. 2013).

289. See also, e.g., *Rooney v. Aber*, No. BS129686, 2011 WL 515473 (Cal. Super. Feb. 13, 2011); *Rooney v. Aber*, No. BS129687, 2011 WL 515474 (Cal. Super. Feb. 13, 2011) (petition for order of protection).

290. *Marshall*, 961 N.Y.S.2d at 447.

the defendant of his extremely wealthy mother, socialite Brooke Astor.<sup>291</sup> The defendant was convicted of multiple counts of grand larceny, one of which carried a mandatory prison sentence.<sup>292</sup> The defendant and his attorney were involved in procuring significant changes to the victim's estate plan, even though she had been diagnosed with dementia.<sup>293</sup> Finally, the victim's grandson, the defendant's son, filed a guardianship petition, bringing the actions to light.<sup>294</sup> On appeal, the court considered the sufficiency of the evidence<sup>295</sup> and discussed the implications of a power of attorney from the victim to the defendant.<sup>296</sup>

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291. *Id.* at 449–51.

292. *Id.* at 449, 453.

293. *Id.* at 450.

294. *Id.* at 449–50.

295. *Id.* at 451.

296. *Id.* at 452.

#### IV. An Increase in Prosecutions?

Our very simple search shows, by decade, an increase in the number of appeals of financial exploitation cases.<sup>297</sup> Although this is not a scientific survey and we cannot explain why there has been an increase in the number of financial exploitation prosecutions, we do have some theories. It could be that more defendants decided to appeal. Perhaps, there are simply more cases of financial exploitation. Perhaps, it is an increase in publicity regarding financial exploitation.<sup>298</sup> Perhaps, the increase is because there are more training materials offered for prosecutors, prosecutors who specialize in elder abuse cases, or maybe there has been more public outcry.<sup>299</sup> With the baby

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297. We included four cases for 1990–1999, twenty-two cases for 2000–2009 and sixty-three cases for 2010–2016. *See also* Hansen et al., *supra* note 10, at 899–900 (noting an increase in cases of financial exploitation).

298. Interview: Heisler, *supra* note 13 (suggesting increased reporting due to increased public education and awareness); *see also generally*, NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE, & CTR. FOR GERONTOLOGY AT VIRGINIA TECH, *Broken Trust: Elders, Family, & Finances MetLife Mature Market Institute* (Mar. 2009), <https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>; METLIFE MATURE MARKET INST. METLIFE MATURE MARKET INST., NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE, & CTR. FOR GERONTOLOGY AT VIRGINIA TECH, *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, & Predation Against America's Elders* (June 2011), <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

299. Interview: Greenwood, *supra* note 13; Interview: Heisler, *supra* note 13 (interview where we asked Mr. Greenwood if his office is seeing more cases and his thoughts as to why the increase. He suggested the following: "increasing confidence among prosecutors that we can prevail; a larger database of victims; more effective awareness campaigns; better training for both law enforcement and bank/credit union staff as to recognizing the crime; and slowly an acceptance by law enforcement that the appropriate response is not always 'it's just a civil matter!'" We specifically asked Mr. Greenwood for his top three reasons for an increase in the number of financial exploitation cases over the past three years. *Id.*) He gave us the following insights:

[a] Better training for prosecutors and law enforcement and financial institution staff which result in quality investigations being converted into real cases [b] Effective awareness campaigns that provide victims and their families with information as to who to call when a theft has been discovered [c] Crooks discovering that most of the wealth is in the hands of seniors, many of whom are beginning to show a lapse in judgment or in cognitive skills.

Interview: Greenwood, *supra* note 13.

In our interview with Candace Heisler, she offered the following suggestions: increased reporting of the crimes due to better public education; more thorough investigations including law enforcement, APS, and prosecutors' investigators; better training of law enforcement, APS and prosecutors; and innovations through the courts that improve a victim's access to justice. Interview: Heisler, *supra* note 13.

boomers, it may also be that there are more potential victims. We must also consider that this increase in the number of appellate cases also means there is an increased caseload for the prosecutors.<sup>300</sup>

When looking at the appellate cases, we saw a range of issues being appealed.<sup>301</sup> Of course, we expected to see cases in which the perpetrator had a relationship with the victim, because that is an element of financial exploitation in some state statutes.<sup>302</sup> In cases in

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300. Interview: Greenwood, *supra* note 13. We asked Mr. Greenwood his thoughts on the challenges that come from the increased number of cases and what would make the challenges less daunting. He offered the following:

For us the biggest challenge is keeping up with the demand. Because we spend so much time on educating public, law enforcement and strategic professional groups we are seeing an influx of inquiries and investigated cases. So resources are being stretched. And under my leadership of the unit I have been adamant that we do not set a threshold for a loss—meaning that we never reject a case simply because the dollar figure is low. I recognize that many prosecutorial agencies will not file a case where the \$ amount is below a certain number. For me that smacks of prosecutorial arrogance. A simple solution that will make the future challenges less daunting is finding ways to increase our staffing in terms of hiring additional DA Investigators. Right now we have 3 full time investigators. We could use at least 3 more. I prefer that our office handle an elder financial exploitation case from the start—since we can then dictate what questions get asked and which witnesses get talked to. Even though we have seen a dramatic improvement in some law enforcement investigations, nevertheless we know that the best cases for prosecutions originate with an internally investigated case.

*Id.*

301. The issues included constitutionality of the statute (*see e.g.*, *Cuda v. State*, 639 So. 2d 22 (Fla. 1994)); sufficiency of the evidence (*see, e.g.* *Marks v. State*, 623 S.E.2d 504 (Ga. 2005)); and sentencing (*see, e.g.*, *Gridley*, No. 2-14-1093, 2015 WL 8773238) to name a few.

302. *See, e.g.*, 720 ILL. COMP. STAT. 5/17-56(a) (stating “[a] person commits financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person or a person with a disability and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person or a person with a disability or illegally uses the assets or resources of an elderly person or a person with a disability”); CAL. PENAL CODE § 368(d)(e) (differentiating between caretaker financial exploitation and non-caretaker financial exploitation); *but see* *AEQUITAS*, *supra* note 6, at 5, 42 U.S.C. § 1397j(8) (2018) (defining exploitation as “fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets”); FLA. STAT. § 825.103(1)(a) (defining “Exploitation of an elderly person or disabled adult” [as] . . . [k]nowingly obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who . . . [s]tands in a position of trust and confidence

which the statute requires a trusted relationship, how does the prosecution prove the existence of the relationship?<sup>303</sup> One Illinois appellate court held that allowing the perpetrator, possessing business acumen, to manage the victim's assets when the victim was frail and dependent, coupled with the victim testifying that the victim had complete trust in the perpetrator was sufficient evidence to establish a fiduciary relationship.<sup>304</sup> California's statute covers both situations, differentiating between caregiver (a trusted relationship) and non-caregiver perpetrators in financial exploitation cases.<sup>305</sup> In others, the existence of a power of attorney would be deemed to create a fiduciary relationship between the victim and the perpetrator.<sup>306</sup>

We also were not surprised to see some cases in which there was abuse of a power of attorney<sup>307</sup> as we all have noticed articles about

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with the elderly person or disabled adult; or . . . [h]as a business relationship with the elderly person or disabled adult . . ."); KY. REV. STAT. § 209.020(9) (West 2017) (defining "Exploitation" as obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources.); MINN. STAT. § 609.2335 subd. 1 (2013) (providing (1) "fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations of a responsible party . . ." or (2) "in the absence of legal authority . . . [by] undue influence, harassment, or duress . . . forces, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another; or . . . establishes a relationship with a fiduciary obligation to a vulnerable adult by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement."); OR. REV. STAT. § 163.205(1)(b)(D) (2012) (defining legal duty, hides, takes, appropriates property of victim).

303. See, e.g., *Gayle*, 2012 WL 7007700, at ¶ 111 (considering the relationship between the perpetrator and the victim, if the perpetrator is the agent under the victim's power of attorney, then the perpetrator is a fiduciary for the victim and has fiduciary duties. "[E]vidence shows defendant was [the victim's] power of attorney. '[O]ne who holds a power of attorney . . . is a fiduciary as a matter of law.'").

304. *Layne*, 677 N.E.2d at 474.

305. See CAL. PENAL CODE §368(d)-(e) (explaining "(d) Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as follows . . . . (e) Any caretaker of an elder or a dependent adult who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of that elder or dependent adult, is punishable as follows . . .").

306. See, e.g., *Bates*, 2006 WL 3604352; *Gayle*, 2012 WL 7007700, at ¶ 104; *Ahart*, 309 P.3d 9; *Campbell*, 2012 WL 6554410.

307. *Bailey*, 948 N.E.2d 690; *Davis*, 2011 WL 10468064, at ¶ 24; *Gayle*, 2012 WL 7007700, at ¶ 111 (stating that the "evidence also supports the conclusion any rational jury could have found defendant misappropriated [the victim's] assets

the misuse of powers of attorney.<sup>308</sup> The very things that make powers of attorney so appealing may also be the very things that make powers of attorney useful to the perpetrator when financially exploiting victims.<sup>309</sup> For example, the perpetrator may be able to inappropriately obtain a power of attorney from a victim or misuse the power of attorney to benefit the perpetrator.<sup>310</sup>

One of the items we found interesting among the appellate opinions is cases in which the appeal was based on insufficiency of evidence. Recall that when trying a case, the prosecutor has the burden of proof, and when convicted, the defendant may argue on appeal that there was insufficient evidence to sustain the conviction.<sup>311</sup> The following cases illustrate appeals based on the sufficiency of the evidence and what evidence might be considered sufficient to support a guilty verdict.

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through a breach of fiduciary relationship. The evidence shows defendant was [the victim's] power of attorney"); *Hoard*, 2013 WL 3357841; *State v. Owsley*, 996 N.E.2d 118 (Ill. App. Ct. 2013). See also U.S. GOV'T ACCOUNTABILITY OFFICE, *Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation* 1, 16–18 (Nov. 2012), <http://www.gao.gov/assets/660/650074.pdf> (discussing potential misuse of the powers of attorney) [hereinafter *Elder Justice*]; Susan Keilitz et al., *Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response* 1, 2–3 (2013), [http://www.eldersandcourts.org/~media/microsites/files/cec/poa%20white%20paper%20final%209\\_3\\_2013.ashx](http://www.eldersandcourts.org/~media/microsites/files/cec/poa%20white%20paper%20final%209_3_2013.ashx) (giving recommendations to courts to minimize potential power of attorney abuse) [hereinafter Keilitz et al.]; Hansen et al., *supra* note 10, at 902 (noting financial exploitation by agent under power of attorney).

308. See, e.g., Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 295–302 (2008); Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 3, 9 (Fall 2006); Alexis Rowe, *Overseeing Durable Power of Attorney in Iowa: Discouraging Abuse, Honoring Principals*, 63 DRAKE L. REV. 1201, 1211–14 (2015); see also Keilitz et al., *supra* note 307.

309. See Keilitz et al., *supra* note 307, at 4 (discussing the risks of powers of attorney. Further the author's note that there is little if any oversight, allowing an agent to act with unfettered access over the principal's property.); see also *Elder Justice*, *supra* note 307, at 15 (stating the potential for forgery of POA or wrongfully obtained, perhaps no consent or knowledge of victim; inappropriate use of POA to benefit agent).

310. *Elder Justice*, *supra* note 307, at 15 (expressing concern about misuse of POA by agents).

311. See generally CHARLES A. WRIGHT & ARTHUR R. MILLER, 2A FED. PRAC. & PROCEDURE: FED. RULES OF CRIM. PROCEDURE § 403 (4th ed. 2016) ("Thus, the burden is on the government to establish beyond a reasonable doubt every element necessary to constitute the crime."). See also AEQUITAS, *supra* note 6, at 24–25, 32.

For various reasons, prosecutors may have some difficulty proving their case.<sup>312</sup> Circumstantial evidence may be sufficient to prove the defendant's guilt.<sup>313</sup> For example, in *State v. Campbell*,<sup>314</sup> among other things, the defendant appealed his conviction, claiming that circumstantial evidence was insufficient to support the conviction of financial exploitation.<sup>315</sup> The defendant had a fiduciary relationship with his mother based on the financial accounts and fiduciary appointments.<sup>316</sup> His mother's health was deteriorating, the money was contributed only by his mother, the defendant was financially sophisticated, and he had knowledge regarding his fiduciary duties.<sup>317</sup> The defendant made no contribution of funds and used his mother's money for his personal benefit; it was sufficient to show that these activities were to benefit the defendant, not, as the defendant claimed, to protect the victim's independence.<sup>318</sup>

Not only may there be obstacles for the prosecutors as far as evidence and witnesses, Candace Heisler, a former assistant district attorney, suggests some other obstacles that may occur. There may be resource issues, such as access to the necessary experts, or "societal or juror biases about the credibility of older adult victims, such as poor memory, dementia, and that these crimes occur at all. There is reticence to believe that loving family members commit these kinds of acts."<sup>319</sup> As well, the court process is daunting and, as Heisler notes, the length of time from the filing of the charges to the end of the trial is significant, with the victim needed for repeated appearances, to testify multiple times, to be cross-examined, not to mention the

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312. See, e.g., *AEQUITAS*, *supra* note 6, at 32–33, 42–46, 51.

313. See, e.g., *Javellana*, 168 So. 3d at 284 (Defendant appealed his conviction of financial exploitation on the principal's theory, arguing that he did not assist his wife in financially exploiting the victim. In reversing the conviction, the appellate court noted "[g]uilt as a principal may be established by circumstantial evidence, 'but such evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence; evidence which establishes nothing more than a suspicion, or even probability, of guilt is not sufficient.'").

314. No. A11–1847, 2012 WL 6554410 (Minn. Ct. App. Dec. 12, 2012).

315. *Id.* at \*1.

316. *Id.* at \*3.

317. *Id.* ("The circumstances proved at trial on the first element are consistent with a hypothesis of [the defendant's] guilt; the only rational inference is that [the defendant] had a fiduciary obligation to [the victim's] benefit.").

318. *Id.* at \*4.

319. Interview: Heisler, *supra* note 13.

exclusion of evidence based on evidentiary objections.<sup>320</sup> The prosecutors cannot discount the

emotional obstacles, [such as] pressures placed on victims not to proceed, [whether from the] accused, family and friends, [or] cultural and religious leaders . . . , reluctance of victims to go forward, especially if the perpetrator is a loved one, and victim fears (e.g., not being believed, loss of independence, becoming isolated, involuntary placement in a long-term care facility, appointment of a guardian to make decisions about the elder's life).<sup>321</sup>

As far as defenses, the defendant may argue gift<sup>322</sup> or consent,<sup>323</sup> or the defendant may offer some other reason that would be exculpatory<sup>324</sup> if proven to be true.<sup>325</sup> In some cases, a defendant asserted consent by the victim.<sup>326</sup> The prosecution may have to argue that the victim lacked the ability to consent or lacked the capacity to amend estate planning documents.<sup>327</sup> For example, in *State v. Bailey*,<sup>328</sup> the victim had dementia, and the defendant asserted that the victim had authorized the defendant taking over \$300,000 of the victim's funds.<sup>329</sup> The defendant also claimed no knowledge of the revocation of a power of attorney that named the defendant as the victim's agent.<sup>330</sup> If the statute requires a showing that the defendant's control over the property was not authorized, i.e. if the victim has dementia,<sup>331</sup> there must be evidence that the dementia would prohibit the victim from giving such authorization. In such cases, the prosecution needs

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320. *Id.*

321. *Id.*

322. *See, e.g.,* Franke v. State, 188 So. 3d 886 (Fla. Dist. Ct. App. 2016); State v. Bevil, 376 P.3d 294 (Or. Ct. App. 2016); State v. Schlick, 846 N.Y.S.2d 128 (2007).

323. *See, e.g.,* State v. Campbell, No. A11-1847, 2012 WL 6554410 (Minn. Ct. App. Dec. 12, 2012).

324. *See, e.g.,* State v. Browning, 386 P.3d 192 (Or. Ct. App. 2016).

325. *See, e.g.,* UEKERT ET AL., *supra* note 6, at 9 (discussing possible defenses, including consent, gift, Medicaid spend-down, loan, inheritance or legal authority).

326. *See* AEQUITAS, *supra* note 6, at 38. *See also* UEKERT ET AL., *supra* note 6, at 3; Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. (2014) (noting challenges for prosecutors when consent, gift, etc. is asserted as defense).

327. *See, e.g.,* Javellana, 168 So. 3d 283 (reversing defendant's conviction of financial exploitation on the grounds for lack of evidence to show defendant assisted wife in financially exploiting victim).

328. 948 N.E.2d at 696 (showing the defendant appealed on six points, one of which regarded the sufficiency of the evidence).

329. *Id.* at 695-96.

330. *Id.* at 696.

331. *See id.* at 707. Here, the statute in question required that the perpetrator "stands in a position of trust or confidence . . . and . . . knowingly and by deception or intimidation obtains control over the property . . . ." *Id.*

to present expert testimony explaining how the dementia rendered the victim unable to give such authorization and the timeframe within which the dementia rendered the victim unable to give the authorization.<sup>332</sup>

Because the prosecution has the burden of proof, how does the prosecution prove the elements regarding the crime? If the statute requires that the defendant appropriates the victim's property through specific actions, what is needed to meet that burden? The Missouri statute requires that the defendant have the "intent to permanently deprive" the victim of her property through "deception, intimidation, undue influence, or force . . .".<sup>333</sup> In a Missouri appellate court case,<sup>334</sup> there was sufficient evidence of misrepresentations and false statements by the defendant for the conviction.<sup>335</sup> The lack of documentation from the defendant to show any kind of appointment as the victim's caregiver, plus the victim transferring property to the defendant, was sufficient to prove a misrepresentation that caused the victim to act.<sup>336</sup>

An interesting point regarding this was raised during the appeal.<sup>337</sup> The defendant's challenge regarding the sufficiency of the evidence was based on, in part, the misrepresentation not being made to the victim but to the victim's wife.<sup>338</sup> The appellate court held that to meet the elements of the statute, the defendant only had to make the misrepresentation and obtain the property.<sup>339</sup>

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[N]othing in the statute requires that the misrepresentation be made directly to the victim. The statute simply requires that the

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332. *Id.* (In this case two experts testified about the victim's dementia, the timeframes within which the victim suffered from the dementia, and that this type of dementia left individuals unable to handle financial transactions.); *see also* UEKERT ET AL., *supra* note 6, at 10–11, 15, 20.

333. *State v. Livingston-Rivard*, 461 S.W.3d 463, 467 (Mo. Ct. App. 2015) (citing to MO. REV. ST. § 570.145.1 and demonstrating that the Missouri statute requires that the defendant's actions amount to "deception, intimidation, undue influence, or force").

334. *Id.* at 463.

335. *Id.* at 467–68 (finding the defendant made a false statement to the victim about the state taking his property if he went into a nursing home in an attempt to induce the victim to transfer his property to the defendant. The defendant also made false statements that she had been officially appointed to be the victim's caregiver.).

336. *Id.* at 468.

337. *Id.*

338. *Id.*

339. *Id.*

defendant obtain control over property “by deception, intimidation, undue influence, or force . . . .” The plain meaning of this language requires proof that deception was used, not necessarily that the defendant lied directly to the victim.<sup>340</sup>

In an unreported case from Illinois, one of the grounds raised by the defendant on appeal was that the state failed to prove one of the elements of financial exploitation—that the defendant unduly influenced the victim.<sup>341</sup> The statute in question provided that financial exploitation may occur if the defendant either unduly influenced the victim *or* breached a fiduciary duty.<sup>342</sup> The appellate court found sufficient evidence to support the defendant’s conviction on both actions.<sup>343</sup>

What is needed if the statute requires that the defendant have the intent to permanently deprive the victim of his or her property?<sup>344</sup> If the defendant convinces the victim to change title to the victim’s property so that the title passes to the defendant at the victim’s death, is that sufficient to prove that the defendant intended to permanently deprive the victim of the property?<sup>345</sup> In an Illinois appellate case, the court found that “intent to permanently deprive” the victim of her property could be shown when the defendant “[interfered] with . . . [the victim’s] right to determine the manner in which . . . [the victim’s properties] would be disposed of upon [the victim’s] death.”<sup>346</sup>

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340. *Id.* (“Based on the circumstances of this case, a fact-finder could reasonably infer that Defendant’s statements, whether made to Victim or Victim’s wife or to Victim’s family and friends, were used to help deceive Victim and to enable Defendant to obtain the property.”).

341. *Gayle*, 2012 WL 7007700, at ¶ 104.

342. *Id.* at ¶¶ 105, 107.

343. *Id.* at ¶¶ 110–11 (showing for undue influence, the court found that the victim was “frail and dependent,” had a lengthy relationship with the defendant which one expert described as “unhealthy and pathologic,” the victim drastically changed her financial strategy, with significant sums given to the defendant or her relatives, the outcome of which have quickly left her broke, so “[a] reasonable and likely inference is that undue influence was used.”). As far as breach of fiduciary duty, there was sufficient evidence to support the conviction given that the defendant’s actions were to her benefit and she breached the duty owed to the victim. For example, the defendant bought a friend a car with the victim’s funds, and as well used the victim’s funds to pay to have her condo cleaned and to buy cashier’s checks. *Id.* at ¶ 111.

344. *See, e.g., State v. McDonald*, No. 5-10-0211, 2011 WL 10501231 (Ill. App. Ct. Dec. 27, 2011) (stating that although defendant argued loan, evidence showed victim’s dementia made it unlikely victim could have agreed to loan, defendant couldn’t explain loan terms, defendant’s several misrepresentations on how using victim’s property supports finding of deception by defendant).

345. *Owsley*, 996 N.E.2d 118.

346. *Id.* at 119, 122, 127 (stating the defendant, a police officer, in this case “obtained control over the [victim’s] Trust . . . the parcel of land . . . , a certificate of

The defendant had not taken any money from the victim's accounts and would not get the property until the victim's death.<sup>347</sup> Despite that argument, the court held that the "defendant obtained control over [the victim's] properties by engineering the transfer of beneficial interests in those properties to himself."<sup>348</sup> Not only had the defendant not told the truth regarding his knowledge of the location of documents the victim had signed, but also there was an inference that the defendant was not truthful in other statements, and the defendant concealed the existence of the deed by delaying in recording and notarizing it.<sup>349</sup> Similarly to the *Bailey* case discussed above,<sup>350</sup> there was evidence regarding the victim's incapacity and inability to manage his finances: the victim's incapacity was obvious and known to the defendant; and despite this knowledge, the defendant exploited the victim.<sup>351</sup>

Another appellate case, *State v. Davis*, questioned the meaning of the intent to permanently deprive the victim of her property.<sup>352</sup> The defendant violated the terms of a nursing home contract by failing to turn over the victim's social security checks.<sup>353</sup> A Florida appellate court reversed a defendant's conviction of financial exploitation, holding that "there was no evidence of [the defendant's] conscious

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deposit account . . . a savings account . . . , a certificate of deposit account . . . , and [the victim's] retirement plan benefits." As an aside, the defendant contacted an attorney to prepare estate planning documents for the victim and convinced the attorney to give the documents to the defendant to take to the victim to sign. The attorney testified this was an exception to his typical practice but thought the defendant, a police officer, would be trustworthy.).

347. *Id.* at 126.

348. *Id.* at 127.

349. *Id.* at 125.

350. See *supra* notes 195–201, 207–210, 328–332, and accompanying text. See generally *Bailey*, 948 N.E.2d 690.

351. *Owsley*, 996 N.E.2d at 126.

352. *Davis*, 2011 WL 7007700, at ¶ 24.

353. *Id.* at ¶¶ 22, 25, 106–111 (discussing how defendant presented evidence of past practices to bolster her argument that she was authorized to use the victim's Social Security checks for the expenses of the victim's home). Considering the opposing evidence, the appellate court noted that it is the jury's job to reconcile contradictory evidence, weigh witness credibility when considering the evidence and decide how to weigh the testimony of witnesses. Here it was possible for the jury to decide that the prosecution had met its burden and the jury's verdict should stand. The appellate court affirmed the conviction. See generally *Marks v. State*, 623 S.E.2d 504, 507 (Ga. 2005) (holding when defendant took possession of victim's car, convinced victim to give defendant jewelry from victim's safe deposit box, influenced victim to change will, etc. sufficient to show defendant exploited victim).

intent that the crime be committed.”<sup>354</sup> The court found that the jury could have decided that the defendant’s wife was the perpetrator and the state failed to produce evidence that the defendant had any knowledge of his wife’s plans or actions or was involved.<sup>355</sup>

## V. Resources for Prosecutors

Turning from our examination of cases, we next examine resources for prosecutors. In this section, we briefly summarize a few of the resources. This is not an exhaustive list, but intended it to be representative. We do not offer these resources in any particular order.

Over the years, we have noticed more resources<sup>356</sup> for prosecutors that may, at least in part, explain why there are more appellate opinions of criminal convictions for financial exploitation.<sup>357</sup> Training prosecutors and equipping them with the tools to prosecute financial exploitation makes sense.<sup>358</sup> Prosecutors are the ones who make the charging decisions, and so perhaps the availability of more training and education is, at least in part, the reason we have seen increases in the number of cases.

One example is the materials provided by Aequitas,<sup>359</sup> *The Prosecutor’s Resource on Elder Abuse*.<sup>360</sup> This resource is in two parts: Part One is an overview,<sup>361</sup> and Part Two covers prosecuting the case.<sup>362</sup> In discussing financial capacity, the materials explain what is needed for this type of capacity and suggest that certain warning signs may be helpful to the prosecutor in making strategic decisions, such as consulting with experts, highlighting significant medical information, and approaching the cross-examination of the witnesses for the defense.<sup>363</sup> For prosecution of financial exploitation, Part Two breaks down the charging decision based on the elements of the

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354. *Javellana*, 168 So. 3d at 285 (noting the lack of evidence of wrongdoing on the defendant’s part).

355. *Id.*

356. *See, e.g., Elder Justice*, *supra* note 307 (discussing federal agency resources).

357. *See id.* at 58–62 (listing a selection of organizations and their activities).

358. Interview: Greenwood, *supra* note 13; Interview: Heisler, *supra* note 13.

359. *See* AEQUITAS, *supra* note 6.

360. *Id.* at 4.

361. *Id.* at 4–24.

362. *Id.* at 24–62.

363. *Id.* at 18.

crime<sup>364</sup> as well as defenses that should be anticipated,<sup>365</sup> especially that of consent.<sup>366</sup> Part Two of the resource also examines each phase of the proceeding up through sentencing.<sup>367</sup> There is also a chart that suggests the type of expert witness in cases of financial exploitation.<sup>368</sup>

A few years back, the Department of Justice launched the Elder Justice Initiative website.<sup>369</sup> The website contains a wealth of information, both for victims and families,<sup>370</sup> researchers<sup>371</sup> and prosecutors.<sup>372</sup> There is also a section devoted to financial exploitation.<sup>373</sup> The information for prosecutors includes training materials and resources;<sup>374</sup> sample pleadings, whether federal or state, and other documents, searchable by jurisdiction and time frame;<sup>375</sup> a state law database, organized by topic and then searchable by

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364. *Id.* at 35–39.

365. *Id.* at 54–55.

366. *Id.* at 38–39 (explaining “[t]he most common defense in financial exploitation cases is consent. Prosecutors should always anticipate that it will be argued. Usually, it is raised through argument that the money or asset allegedly stolen was a gift, a loan, or payment for something. The elements of consent are typically described as (1) decision-making capacity; (2) knowledge of the true nature of the act or transaction; and (3) free and voluntary giving of consent. All claims of consent must be evaluated against proof of each of these elements. It is not sufficient to accept the victim or suspect’s statement that “I or s/he” gave consent. Investigators must understand each of the elements and locate evidence as to each.”).

367. *See, e.g., id.* at 39–61 (providing examples for each phase leading up to sentencing).

368. *Id.* at 66.

369. U.S. DEP’T OF JUSTICE, *The Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited Oct. 9, 2017) (“[t]he mission of the Elder Justice Initiative is to support and coordinate the Department’s enforcement and programmatic efforts to combat elder abuse, neglect and financial fraud and scams that target our nation’s seniors. The Initiative is also committed to supporting state and local efforts to combat elder abuse, neglect, and financial exploitation through training, resources, and information.”) [hereinafter *Elder Justice Initiative*].

370. U.S. DEP’T OF JUSTICE, *Older Adults, Families, and Caregivers*, <https://www.justice.gov/elderjustice/victims-families-caregivers> (provides an interactive elder abuse roadmap for victims to help them determine the appropriate agency to contact by asking the victim (or another) to click on a response.).

371. U.S. DEP’T OF JUSTICE, *Researchers*, <https://www.justice.gov/elderjustice/research-related-literature> (last visited Oct. 9, 2017).

372. U.S. DEP’T OF JUSTICE, *Prosecutor Training & Resources*, <https://www.justice.gov/elderjustice/prosecutor-training-resources> (last visited Oct. 9, 2017) [hereinafter *Prosecutor Training & Resources*].

373. *See* U.S. DEP’T OF JUSTICE, *Financial Exploitation*, <https://www.justice.gov/elderjustice/financial-exploitation> (last visited Oct. 9, 2017) (using the phrase financial crimes to cover both financial exploitation and financial scams.).

374. *Prosecutor Training & Resources*, *supra* note 372.

375. U.S. DEP’T OF JUSTICE, *Elder Justice Prosecutor*, <https://www.justice.gov/elderjustice/prosecutors/samples> (last visited Oct. 9, 2017).

jurisdiction,<sup>376</sup> and information about regional elder justice task forces.<sup>377</sup> Particularly useful for prosecutors is the prosecutor training video series on topics ranging from investigating and charging, community collaboration, medical issues and evidence, victim capacity, defenses and how to overcome them, undue influence, working with experts, and working with victims to name many of the categories.<sup>378</sup> There are resources as well for other professionals.<sup>379</sup>

The Center for Elders and Courts<sup>380</sup> has many excellent resources available on a variety of topics. Of particular importance for prosecutors is the Elder Abuse Toolkit<sup>381</sup> and the Prosecution Guide,<sup>382</sup> along with an evidence checklist.<sup>383</sup> Additional resources for prosecutors and judges are available on the website.<sup>384</sup>

There are also now resources on financial decision-making capacity. For example, *The Prosecutor's Resource on Elder Abuse* contains a section on financial decision-making capacity.<sup>385</sup> Before going further, it is important to understand the meaning of financial decision-making capacity. It is defined as "the capacity to manage money and financial assets in ways that meet a person's needs and which are consistent with her/his values and self-interest' . . . [and] requires executive function. Financial literacy may decline in later life and be reflected in increasingly rash and irrational financial decision-

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376. U.S. DEP'T OF JUSTICE, *State Elder Laws*, <https://www.justice.gov/elderjustice/elder-justice-statutes-0> (last visited Oct. 9, 2017).

377. U.S. DEP'T OF JUSTICE, *Elder Justice Prosecutor*, <https://www.justice.gov/elderjustice/task-forces> (last visited Oct. 9, 2017).

378. *Prosecutor Training & Resources*, *supra* note 372.

379. *Elder Justice Initiative*, *supra* note 369 (providing resources for law enforcement, victim specialists, and multi-disciplinary teams).

380. CTR. FOR ELDERS & THE COURTS, *About CEC*, <http://www.eldersandcourts.org/About-CEC.aspx> (last visited Oct. 9, 2017) ("The Center for Elders and the Courts (CEC) serves as the primary resource for the judiciary and court management on issues related to aging. Our center strives to increase judicial awareness of issues related to aging, provide training tools and resources to improve court responses to elder abuse and adult guardianships, and develop a collaborative community of judges, court staff, and aging experts . . .").

381. *Toolkits for Prosecutors and Courts*, CTR. FOR ELDERS & THE COURTS, <http://www.eldersandcourts.org/Elder-Abuse/Toolkits-for-Prosecutors-and-Courts.aspx> (last visited Oct. 9, 2017) [hereinafter *Toolkits*].

382. UEKERT ET AL., *supra* note 6.

383. CTR. FOR ELDERS & THE COURTS, *Evidence Collection Checklist*, <http://www.eldersandcourts.org/~media/Microsites/Files/cec/PROSGuidePerf%20EvidCollChecklist.ashx> (last visited Oct. 9, 2017).

384. See *Toolkits*, *supra* note 381; *Elder Abuse Training Resources*, CTR. FOR ELDERS & THE COURTS, <http://www.eldersandcourts.org/Training.aspx> (last visited Oct. 9, 2017); see also UEKERT ET AL., *supra* note 6.

385. AEQUITAS, *supra* note 6, at 18.

making.<sup>386</sup> Notice that the definition makes reference to a person's executive function, that is, a person's ability to undertake abstract reasoning, her cognitive ability to plan and execute to attain her goals, and judgment.<sup>387</sup> Why is it important for prosecutors to understand a victim's financial decision-making capacity? Specific warning signs that show a decline in financial decision-making capacity can help a prosecutor determine whether he or she needs to involve an expert and helps the prosecutor prepare for cross-examination.<sup>388</sup> Dr. Peter Lichtenberg<sup>389</sup> has developed a screening scale for assessing an elder's financial decision-making.<sup>390</sup> The screening is designed to be used at the time immediately prior to or when making a financial decision.<sup>391</sup> The scale contains ten categories for screening, but note that it is designed to be used at a time of a financial decision.<sup>392</sup> As far as prosecution, if the tool was administered at the time of the decision and the results showed a lack of financial decision-making, that would be helpful in proving an element of the offense.

The National Center on Elder Abuse,<sup>393</sup> housed at the University of Southern California Center for Elder Mistreatment,<sup>394</sup> offers a variety

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386. *Id.*

387. Julene K. Johnson, et al., *Executive Function, More Than Global Cognition, Predicts Functional Decline and Mortality in Elderly Women*, 62(A) J. GERONTOLOGY, SERIES A: BIOLOGICAL SCI. & MED. SCI. 1134 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2049089/pdf/nihms32626.pdf> ("Executive functioning is a cognitive skill that involves the planning, initiation, and execution of goal-directed behaviors, mental flexibility, and problem solving.")

388. See AEQUITAS, *supra* note 6, at 18. (stating that warning signs include: "[f]orgetting recent financial or legal transactions . . . [p]roblems keeping track of checks or bills . . . [f]orgetting to pay bills or paying bills more than once . . . [b]eing newly overwhelmed by financial matters . . . [m]aking math and counting errors . . . [i]nability to make change . . . [and] [e]ngaging in risky behaviors and interest in/gullibility for "get-rich quick" schemes").

389. Peter Lichtenberg, WAYNE ST. U.; <http://www.iog.wayne.edu/profile/aa2275/> (last visited Oct. 9, 2017).

390. See generally Peter Lichtenberg et al., *The Lichtenberg Financial Decision Screening Scale (LFDSS): A New Tool for Assessing Financial Decision Making and Preventing Financial Exploitation*, 28 J. ELDER ABUSE & NEGLECT 134 (2016), [http://www.iog.wayne.edu/research/lfdss\\_online\\_publication-jean\\_2016.pdf](http://www.iog.wayne.edu/research/lfdss_online_publication-jean_2016.pdf).

391. *Id.* at 135.

392. *Id.* at 144–45; *Lichtenberg Financial Screening Scales*, <http://www.olderadultnestegg.com/> (last visited Oct. 9, 2017); see also *New Assessments in Financial Decision Making and Financial Exploitation: the Lichtenberg Financial Decision Screening Scale (LFDSS)*, NAT'L ADULT PROTECTIVE SERVS. ASS'N (2016), <http://www.napsa-now.org/wp-content/uploads/2016/08/R2P-Lichtenberg.pdf>.

393. *Who We Are*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/whoweare/index.html> (last visited Oct. 9, 2017) (providing "the latest information regarding research, training, best practices, news and resources on elder abuse,

of resources on financial exploitation among other types of elder abuse.<sup>395</sup> The site offers links to extensive publications on a variety of resources, some directed to the community, others to researchers, and others to legal professionals.<sup>396</sup> For example, resources especially helpful to prosecutors include the *Prosecution of Financial Exploitation Cases: Lessons from an Elder Abuse Forensic Center*,<sup>397</sup> *Fighting Elder Financial Abuse Law Enforcement's Role*,<sup>398</sup> and *Working with the Criminal Justice System*,<sup>399</sup> to highlight a few.

As noted earlier in this Article, state responses to prosecution of financial exploitation vary.<sup>400</sup> Some states may offer state-specific resources for prosecutors. Kentucky, for example, has two specific, unique statutes for financial exploitation: one putting emphasis on a trained prosecutor<sup>401</sup> and the other on the existence of a prosecutor's

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neglect and exploitation to professionals and the public [and is housed] . . . at AoA . . . [and] is one of 27 Administration on Aging-funded Resource Centers. Research shows that as many as two million elders are abused in the United States . . .").

394. *USC Ctr. on Elder Mistreatment*, USC.EDU, <http://eldermistreatment.usc.edu/> (last visited Oct. 9, 2017).

395. *Training Resources on Elder Abuse*, USC.EDU, <http://trea.usc.edu/resources/> (last visited Oct. 9, 2017) ("The Training Resources on Elder Abuse (TREA) site is a collaboration between the USC Department of Family Medicine and Geriatrics and the National Center on Elder Abuse (NCEA). Inspired by the *Elder Justice Roadmap*, [its] goal is to increase the number of professionals, caregivers and community members who receive high quality training on elder abuse.").

396. *NCEA Publications*, USC CTR. ON ELDER MISMANAGEMENT, <http://eldermistreatment.usc.edu/national-center-on-elder-abuse-ncea-usc/national-center-on-elder-abuse-publications/> (last visited Oct. 9, 2017).

397. NAT'L COUNCIL ON CRIME & DELINQUENCY, *2014 Winter Webinar—Prosecution of Financial Exploitation Cases: Lessons from an Elder Abuse Forensic Center*, VIMEO (Jan. 24, 2014), <http://vimeo.com/85543536>.

398. *Legal Aid Assistance of Cal. & Institute on Aging, Fighting Elder Financial Abuse Law Enforcements Role*, VIMEO (Apr. 27, 2015), <https://vimeo.com/126175608> (includes assistant district attorney as panelist).

399. *Working with the Criminal Justice System*, USC.EDU, <http://trea.usc.edu/resource/working-with-the-criminal-justice-system/> (last visited Oct. 9, 2017).

400. See, e.g., *Elder Justice*, *supra* note 307, at 23; see also Hansen et al., *supra* note 10, at 912–19 (discussing various states' statutory approaches); McClurg, *supra* note 326, at 1128–41 (proposing "state criminal statutes that create a permissive presumption of exploitation with respect to certain financial conveyances from elders.").

401. See KY. REV. STAT. ANN. § 209.180 (providing for attorney dedicated to elder abuse and providing for the attorney to handle the case from beginning to end, "[i]f adequate personnel . . . available").

manual.<sup>402</sup> Other states have taken various actions, such as laws and ordinances, public education, and professional training.<sup>403</sup>

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402. See KY. REV. STAT. ANN. § 209.190 (requiring the state attorney general to develop the manual with input from experts in the field, revise it every other year and give copies to all the state and county attorneys).

403. See, e.g., *Elder Justice*, *supra* note 307, at 53–57 (listing various efforts by four states).

## VII. Going Forward

If progress in handling cases of financial exploitation is measured by the number of appellate opinions, then progress is clearly being made, as we see more cases being appealed as the decades pass. But, the progress is measured in inches, rather than yards. What we are doing is a good start, but it isn't going far enough or fast enough.<sup>404</sup> Although preventing financial exploitation is a lofty goal, it is difficult to achieve.<sup>405</sup>

As noted in the previous section, there are robust resources for prosecutors.<sup>406</sup> Whether there are enough resources is beyond the scope of this Article. But, it does appear that there is a fragmentation of resources, as various agencies and states may have their own.<sup>407</sup> Even so, funding always seems to be an issue.<sup>408</sup> In our opinion, in an ideal world, every prosecutor's division should have a unit specifically to prosecute all elder abuse cases.<sup>409</sup> Each district attorney, or the state's legislature, needs to determine that prosecuting financial exploitation cases is a priority.<sup>410</sup> We need uniform reporting by law

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404. Back when the three of us started in our respective fields of law, law enforcement and research, as early as 1981 for one of us, the struggle was to have elder abuse, regardless of the type, recognized as a crime. Instead, officials would often respond that it was a civil matter. This *laissez faire* approach has abated somewhat, but it still persists, unfortunately, to the detriment of the victim. Although progress is being made, we still have a long way to go.

405. See, e.g., *Elder Justice*, *supra* note 307, at 12 (showing it's hard to prevent financial exploitation committed by certain perpetrators).

406. See *supra* notes 356–403 and accompanying text. See, e.g., *id.* at 24–25 (discussing federal agency resources and specifically discussing plans for DOJ's resources for prosecutors).

407. See *id.* at 20–22 (discussing various efforts of specific federal agencies and efforts at coordination as a result of the Elder Justice Act's Coordinating Council).

408. *Id.* at 23; see also Interview: Heisler, *supra* note 13 (discussing the resource challenges faced by prosecutors' offices such as the time-consuming nature of the cases, the lack of expertise in prosecutors' offices "(e.g., absence of a forensic accountant, expert to assess capacity, inadequate investigative personnel time and expertise)" the obstacles to obtaining copies of expert reports filed in guardianship and conservatorship cases, and challenges to find critical witnesses or documents).

409. See, e.g., *Elder Justice*, *supra* note 307, at 23 (noting some states' efforts to have specific divisions or employees for the purpose of handling financial exploitation cases).

410. See, e.g., Interview: Greenwood, *supra* note 13; Interview: Heisler, *supra* note 13. Greenwood says,

I tell rural counties that they should never use lack of resources as an excuse to NOT file financial elder abuse cases. Some recommendations are: [a] Go to the media and talk about trends in the 'silver tsunami' cases that will be coming through in the next 5 years [b] Schedule a public meeting at the Board of Commissioners/Supervisors who hold the County budget purse

enforcement, even if this takes federal action<sup>411</sup> and clarity regarding terminology if we are ever to have an accurate data on the number of financial exploitation cases.<sup>412</sup>

We are not saying that prosecuting these cases is easy. In fact, we noted challenges to prosecution in the prior section. Even those prosecutors' offices with limited resources can take lessons from the cases we have discussed, as well as those we have not.<sup>413</sup> For example, does the statute require that the defendant know about the vulnerability of the victim? Prosecutors should file criminal charges even if the victim's vulnerability is not apparent.<sup>414</sup> The victim's relationship to the defendant can be used to show the victim's susceptibility to the defendant's manipulations.<sup>415</sup> Since *actus reus* may be proved in many ways, prosecutors need to think creatively when explaining how the defendant obtained the victim's property.<sup>416</sup> Even if the defendant has access to the victim's money through some legal vehicle, such as a power of attorney or joint account, that does not prohibit a successful prosecution of the defendant.<sup>417</sup>

The focus of this Article is quite narrow—we are looking specifically at appellate opinions on criminal prosecution of financial exploitation. We admit that the catalyst for this Article was a simple conversation preceding a presentation, during which we wondered

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strings to talk about this problem and bring to that meeting victims to tell their story; [c] look for grant opportunities [d] write to as many philanthropists as possible to educate them on the challenges ahead [e] examine ways to use funds from drug money seizures in the county [f] reach out to retired professionals in your community to ask for volunteers... attorneys, nurses, CPAs who can add so much to your team.

Interview: Greenwood, *supra*, note 13.

Candace Heisler noted that "[i]t has become a priority for prosecution agencies. Some offices have created specialized prosecution units that vertically prosecute (same prosecutor handles the case from beginning to end and works with the victim.)" Interview: Heisler, *supra* note 13.

411. See, e.g., *Elder Justice*, *supra* note 307, at 39–40 (recommending, among other steps, the gathering and sharing nationally of more effective data that educates decisions at all levels concerning both fighting and responding to cases of financial exploitation).

412. See, e.g., *id.* at 35–38 (discussing how lack of data impedes the fight against financial exploitation).

413. The following suggestions come from Professor Roberta K. Flowers, Stetson University College of Law, and former prosecutor. Email from Professor Flowers dated July 10, 2017 (on file with Authors).

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

whether progress was actually being made. There are many important and fascinating issues regarding financial exploitation that are simply beyond the scope of this Article.

Yes, there are more appellate opinions, most likely meaning that there are more criminal cases being filed. Aggressively prosecuting perpetrators who financially exploit elder victims may not necessarily have a deterrent effect, in our opinions, but hopefully doing so will bring needed and overdue justice to these victims who have been so severely harmed.<sup>418</sup>

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418. See, e.g., *Elder Justice*, *supra* note 307, at 1 (discussing vulnerability of victims and impact of being financially exploited).

